REPORTS

OF CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

WESTERN DIVISION,

APRIL TERM, 1884,

EASTERN DIVISION,

SEPTEMBER TERM, 1884,

AND

MIDDLE DIVISION,

DECEMBER TERM, 1884.

BENJAMIN J. LEA,

ATTORNEY-GENERAL AND REPORTER.

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1885.

Rec. Apr. 3, 1885

JUDGES OF THE SUPREME COURT
OF TENNESSEE.

STATE AT LARGE.

JAMES W. DEADERICK, Ch. J.,
PETER TURNEY.

EASTERN DIVISION.

J. B. COOKE.*

MIDDLE DIVISION.

WILLIAM F. COOPER.

WESTERN DIVISION.

THOMAS J. FREEMAN.

ATTORNEY GENERAL:

BENJAMIN J. LEA,
BROWNSVILLE, TENN.

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OF TENNESSEE.

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J. W. BUFORD.....JACKSON.

*Appointed to fill the vacancy occasioned by the death of Judge Robert McFarland.

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*Appointed to fill the vacancy occasioned by the death of Chancellor H. C. Smith.

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E. L. BULLOCK, Com. Law and Chancery Ct., Madison.....Jackson.

G. P. M. TURNER, Criminal Court, Shelby.....Memphis.

CASES REPORTED.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

WESTERN DIVISION,

JACKSON, ... APRIL TERM, 1884

GEO. N. PARKS *v.* NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY.

PLEADINGS AND PRACTICE. *Recovery of penalties.* Under the act of 1865, ch. 15 (Rev. Code, sec. 4927, *b*, *c*, *d*), which makes a railroad company liable to forfeit and pay a penalty of $100, upon a failure of the company, during any one trip of the passenger cars, to announce the stopping place or station at which the train stops, only one penalty can be recovered up to the bringing of the suit.

FROM OBION.

Appeal in error from the Circuit Court of Obion county. C. ADEN, J.

MATT. NEIL, W. C. CALDWELL and JO. R. HAWKINS, Jr., for Parks.

A. W. CAMPBELL for Railroad Company.

Parks v. Railroad Company.

COOPER, J., delivered the opinion of the court.

Action for the recovery of penalties under a statute. The circuit judge sustained the demurrer to the declaration. The Referees report that the judgment should be reversed upon the ground that the plaintiff is entitled to recover in full as claimed. The exceptions open the case.

The act of 1865, ch. 15, sec. 2 (Rev. Code, sec. 4927 *b*), provides as follows: "It shall be the duty of each conductor or other employee on any railroad in this State to announce in loud, distinct words, for each passenger car, the stopping place, station, depot or town at which each car or passenger train stops, or shall be detained for any purpose, and also the time such car, or passenger train will stop or be detained."

The next section is: "Every railroad company shall cause such passenger car to be well supplied with pure and wholesome water, and in cool weather have each passenger car provided with comfortable fires, and at night furnished with sufficient light for the use, comfort and convenience of the passengers."

The next section is: "Upon failure of any railroad company, during any trip of the passenger cars, to comply strictly with any of the provisions of the preceding sections of this act, then such railroad company shall forfeit and pay the sum of one hundred dollars, recoverable before any court having jurisdiction thereof, one-half to be paid to the person suing, and the other half to go to the common school fund of the State."

The action was brought by George N. Parks against

the Nashville, Chattanooga & St. Louis Railway to recover penalties alleged to have been incurred under the foregoing act, for the failure of the conductor or other employee of the company to announce, on its passenger trains, at the Paducah junction, a stopping place of such trains, the station and the time the train would stop or be detained. The declaration contained 240 counts, each for a separate penalty for a distinct failure of duty. The defendant demurred to the declaration, assigning as causes of demurrer, first, that the penalty sued for was unconstitutional, and, secondly, that the individual conductor or employee, upon whom the duty of performance was imposed by law, could alone be held responsible for the penalty, a corporation aggregate being incapable of incurring the penalty, or being sued therefor.

Although the first section of the statute quoted above imposes the duty specified by it upon the "conductor or other employee," while the next section imposes the duties specified therein upon the railroad company, yet the intention of the Legislature was to require certain acts to be done for the comfort and accommodation of passengers on railroad trains, and to secure their performance by a penalty for the failure, to be sued for by any person aggrieved certainly, and, perhaps, by a common informer. The regulations prescribed are within the police power of the Legislature, and the mode adopted for their enforcement is one well known to the common law, and frequently occurring in our statutes. It is true, the penalty is usually imposed upon the person who is required to perform

the duty, and whose delinquency gives the right of action. Corporations aggregate can only act through agents, and can only be subjected to the police power of the State in this mode by being made responsible for the default of their servants. Perhaps, there can be no reasonable doubt of the liability of a corporation or superior in such cases, where the legislation is remedial, not punitive, although the subject is left in much obscurity by the authorities. The case before us may be decided upon well recognized principles.

All the authorities agree that statutes like the one under consideration must be construed strictly. They further agree that a master or principal may be made liable for a reasonable penalty for the act or omission of an employee or agent in the line of his duty, where the penalty is remedial, not punitive. The inclination of the courts is, therefore, to construe such statutes as remedial, that is as intended to redress an actual injury with a view to prevent its recurrence, and not as punitive, that is, as intended to punish whether the injury has accrued or not. It is in the latter class of cases that the gravest doubts have been entertained whether the principal could be made liable at all to a penalty for the act or omission of the agent or employee: *Dickinson* v. *Fletcher*, L. R., 9 C. P., 1; *McCown* v. *New York Central Railroad Company*, 50 N. Y., 176.

The intent of the Legislature in the statute before us was to secure certain benefits to passengers on the railroad trains. It was, of course, never intended that a penalty should be incurred if in fact there were no

passengers on the train, or in a car of the train in which there was a default. And a failure to call a station at which no passenger intended to get off, or did in fact get off could do no harm, and would be at most only a technical breach of the law. If the statute be construed literally, or as punitive, there would be a penalty even in such cases. Penalties would also be incurred by acts of inadvertence or omissions of negligence although no person was aggrieved thereby. And if each default gave a right of action, and might be sued upon at any time, the purpose of the Legislature would be lost sight of, and the act be perverted and made punitive instead of remedial. The common law forbids the infliction of penalties or punishment more than once on the same offender, although guilty of several distinct offenses. By that law, and it was so construed in this State, a conviction, judgment and execution for a felony not capital were a bar to all other indictments for felonies not capital committed previously: *Crenshaw* v. *State*, M. & Y., 123; 1 Bish. Cr. Law, sec. 1070. And the courts have been always opposed to the enforcement of penalties except to the extent necessary to secure the manifest object of their infliction. For this reason, as we have seen, they are agreed in construing penal statutes strictly.

The act before us gives the forfeiture upon the failure of any railroad company to comply with its provisions "during any trip of the passenger cars." Under the rules of construction adopted by the courts, there would be only one penalty for each trip. The

statute does not in so many words give the right of action to a common informer, and the argument is strongly persuasive, especially in view of the amount of the penalty, that the right of action is given only to a passenger aggrieved by the default. But if it be conceded that a *qui tam* action might be brought by any one, the statute does not say that there shall be a penalty for "each and every offense." In the absence of these words, it seems to be settled that only one recovery can be had for acts or omissions, in violation of the statute, prior to the commencement of the suit: 5 Wait's Act. and Def., 164. The reason is, that it is the action which will bring the default to the attention of the corporation or party, and secure a compliance with the law. And it is the performance of the duties imposed which enures to the benefit of the passengers, on whose behalf the act was passed. A different construction would contravene the legislative intent, leave an opening for the perversion of the act, and make a statute punitive which was intended to be remedial.

Accordingly, under a statute giving a penalty against any person employing another to act as a pilot who has no license, it was held that there could be only one recovery against the defendant, although he had employed an unlicensed pilot for several ships: *Sturgis* v. *Spofford*, 45 N. Y., 446. The same ruling was made, where a penalty of $50 was given against any railroad company for taking more than a fixed rate of fare: *Fisher* v. *New York Central Railroad Company*, 46 N. Y., 544. "The omission from the statute

of the words 'for each and every offense,'" say the court in that case, "shows clearly that the Legislature did not intend to open the door to a practice adopted in a case originating in another part of the State, now under advisement in this court, of opening a book account of penalties accrued, and delaying suit for a year, when such penalties amounted to between twenty and thirty thousand dollars. A construction permitting this would defeat the intention of the Legislature, which was to suppress the extortion by prompt prosecution, by enabling parties to forbear suing until the aggregate penalties amounted to a large sum, and induce others to do as one of the plaintiffs in one of the cases now in judgment was honest enough to testify he did; that was, to abandon other business, and spend his time for a considerable period in riding back and forth from Tonawonda to Buffalo for the purpose of earning penalties."

The plaintiff in this suit has brought before us precisely the case presented to the court of Errors and Appeals of New York under a similar statute. The decision of that eminent tribunal commends itself to our judgment and sense of justice. To allow a person to open a book account of penalties at an insignificant way station, and run up a charge of $24,000 for the failure of the conductor to announce the station, or the length of stay, of which no passenger has complained, would shock the conscience, pervert the intention of the Legislature, and turn a remedial into a highly punitive statute. It would be a literal construction of the words of the statute, which would

recall the similar construction by a somewhat famous judicial tribunal of the middle ages of a law making it a capital offense to shed blood in the street, whereby an unfortunate leech was condemned to the gallows for bleeding his apoplectic patient on the side walk where he had dropped down. If the Legislature had, in the act before us, in so many words authorized what the plaintiff has done, without any notice to the company, it would be difficult to sustain the constitutionality of the statute. For the effect would be the imposition of an excessive fine: Const., Art. 1, sec. 16. But the Legislature had no such intention, and we shall not press the language used so as to do indirectly what could not, perhaps, have been done directly. The statute, both upon reason and authority, admits of a different construction. We are of opinion, therefore, that only one penalty can be recovered up to the bringing of the suit.

The causes of demurrer assigned, strictly speaking, do not cover the grounds of our decision. But the statute which requires that demurrers shall state the objection relied on applies equally to cases at law and in equity: Code, sec. 2934; *Kirkman* v. *Snodgrass*, 3 Head, 370. And we have uniformly held that when a bill contains no equity, it may be dismissed although the causes of demurrer assigned may not cover the real defects: *Lane* v. *Farmer*, 11 Lea, 568, 577. We have also held that although the demurrer be insufficient because bad in part, yet upon an appeal from the ruling of the court on the demurrer the court would determine a question involved in the suit which

would greatly narrow the contest, and tend to the speedier termination of the litigation: *Riddle* v. *Motley*, 1 Lea, 468. These rules equally apply to an action at law, the statutes regulating the demurrer and the appeal being the same.

The exceptions to the report of the Referees will be sustained, the judgment of the court below reversed, and the cause remanded for a repleader with leave to the defendant to move to strike out all the counts of the declaration except one to be selected by the plaintiff, and with directions to the circuit court to proceed in accordance with this opinion by striking out the other counts. The defendant will pay the costs of this court.

TURNEY, J., delivered the following opinion:

This action involves a construction of three consecutive sections of the act of 1865–6, ch. 15, brought into the Code by section 4927 *a*, *b*, *c*, as follows:

"It shall be the duty of each conductor or other employee on any railroad in this State to announce, in loud, distinct words, for each passenger car, the stopping place, station or depot, or town at which each passenger train stops, or shall be detained for any purpose, and also the time such car or passenger train will stop or be detained."

"Every railroad company shall cause such passenger car to be well supplied with pure and wholesome water, and in cool weather have each passenger car provided with comfortable fires, and at night furnished

with sufficient light for the use, comfort and convenience of the passengers.

"Upon the failure of the railroad company, during any trip of the passenger cars, to comply strictly with any of the provisions of the two preceding sections of this Act, then such railroad company shall forfeit and pay the sum of one hundred dollars, recoverable before any court having jurisdiction thereof, one-half to be paid to the person suing, the other half to the common school fund of the State."

To correctly get at and understand the object of the Legislature, it is necessary to keep in mind the wording of this statute as connected provisions throughout. It applies alone to "*passenger trains.*" It contemplates the convenience and comfort of passengers only. The object of calling the names of depots, stations, etc., can reasonably have the two objects, one to keep the passenger advised of the fact that his destination has been reached, the other to inform strangers of the points on the roads, with perhaps the additional purpose of advising passengers whether they will have time to leave the cars and return for a continuation of the trip. Persons not passengers, and not desiring to be so, can have no interest in the performance of or the failure to perform the duties defined. Taking the entire law, and construing it as a whole, I entertain no doubt of the correctness of this construction. Would any one suppose the Legislature had any intention to provide for the comfort, thirst or warmth of one who might be loitering about depots, or that it designed to furnish

such an one lights at night from the lamps of the train?

The term "*the person*," employed in the third section, relates to the passengers, and means the passenger suing. While I think the Legislature possessed the power under the Constitution to pass the law, I also think that it must be so construed as to be confined to its effects upon passengers, or those who propose to be such in good faith, and for the purpose of going from point to point along the line of the particular road as travelers, and not to include such as travel solely for the purpose of speculation or profit to be derived from eavesdropping or playing the parts of spies or detectives; and that therefore the party suing must show that he was or intended to be such passenger, and was not traveling for the disreputable purposes indicated, and did not enter the train with a view to them.

The declaration should aver that the person suing was a passenger, or purposed to be one at the time and place of omission.

COOKE, Sp. J., concurs in this opinion.

FREEMAN, J., delivered the following dissenting opinion:

This action is brought by plaintiff to recover penalties imposed by act of 1865–6, for failure of the conductor or other employee of the company to announce, on its passenger trains, at the Paducah junc-

tion, a stopping place of said road, the station, and the time the train would stop, or be detained. The declaration contained 240 counts, each for a distinct failure of duty. The defendant demurred to the declaration, and stated two grounds of demurrer: First, that the penalty sued for was unconstitutional; and second, that the person upon whom the duty is imposed by the law can alone be held responsible for its non-performance—a corporation aggregate being incapable of incurring the penalty or being sued therefor. The demurrer was sustained by the circuit judge, and the defendant appealed.

The Act of 1865 is one of a series of acts of our Legislature passed under the police power to regulate the conduct of railroads, for the safety, convenience and comfort of the traveling public.

The first section requires persons who sell tickets to passengers at any station to open their offices an hour before the time of departure of trains, and for failure to comply with this requirement the delinquent is subjected to indictment or presentment, and on conviction is to be fined not less than twenty nor more than fifty dollars.

Sec. 2, Code, sec. 4927*b* is: "It shall be the duty of each conductor, or other employee on any railroad in this State, to announce in loud and distinct words, for each passenger car, the stopping place, station or depot or town at which each car or passenger train stops, or shall be detained for any purpose, and also the time such car or passenger train will stop or be detained."

The next provision is one regulating the fires, water and lights at night on said cars.

The next section, 4927*d*, is: "Upon failure of any railroad company, during any trip of the passenger cars, to comply strictly with any of the provisions of the two preceding sections of this act, then such railroad company shall forfeit and pay the sum of one hundred dollars, recoverable before any court having jurisdiction thereof, one-half to be paid to the person suing, and the other half to go to the common school fund of the State."

This statute is clearly a command of the Legislature, demanding obedience on the part of the railroad companies, and if within the constitutional competency of that body, it is to be construed and enforced as any other enactment. We must first ascertain its meaning, and then see that it be enforced as enacted. That meaning is to be ascertained from the language used, giving it the fair and natural construction which the words usually have in our language. There is no difficulty in doing this here, as there are no words of doubtful import, all are readily understood.

It is clear these provisions were intended to be penal, that is, the money to be paid on violation, when suit is successfully prosecuted, was intended as a punishment for the breach of the law. It is certain it was not intended to be compensatory in any sense, because an arbitrary amount is fixed for any case, and one-half only goes to the party suing, the other to the common school fund.

What then is the meaning of the provisions of

section 4927 *b*? It requires, in plain terms, that the conductor or other employee of the road, shall announce, as required, for each passenger car, the stopping place, station or depot at which each car or passenger train stops, or shall be detained for any purpose, and the time such train will stop. This is too plain to be misunderstood. Whenever a train stops at a station, depot or town, this announcement must be made, or the statute is not obeyed. It is violated by any failure. Such violation may take place at any station on a trip from one point of departure to the destination of the train where the train may stop. Ordinarily it can only occur on the same trip but once at the same station, as the train can only pass that place once on a trip. The language of the section imposing the penalty is: "Upon failure of any railroad company during *any* trip of the passenger cars to comply strictly with *any* of the provisions of the preceding sections, then the company shall *forfeit* and pay the sum of one hundred dollars, recoverable before any court having jurisdiction thereof, one-half to be paid to the person suing, and the other half to go to common school fund."

What is the requirement that must be strictly complied with? The conductor or other employee on any railroad, *is to announce in loud and distinct words, for each passenger car, the stopping place, station, or depot or town*, at which each car or passenger train stops, or shall be detained for any purpose, and also the time such car or passenger train will stop or be detained.

This duty is so plainly written there can be no misunderstanding it, that the announcement must be made of "the stopping place, station, or depot or town at which *each* car or *passenger* train stops." Whenever a place, station, depot or town is stopped at by a car or passenger train the duty must be performed. To comply with this law at any station where such stoppage takes place the announcement must be made. This is too clear for argument. Suppose, for instance, on any trip from one point to another, at one half the stations or stopping places the announcement is made, the other half not, it cannot be doubted that the law has been complied with half the time, and the other half has been violated—if six stations, the law will have been complied with three times, no one can doubt—but it is equally certain at the other three stations has not been obeyed; compliance and non-compliance are precisely the opposites each of the other—what, if done, is compliance, if omitted, is non-compliance.

When is the penalty or forfeiture incurred? is the next question. The language of this statute must be taken in its ordinary and well-understood meaning, and when this is seen, it must be held to be the intention of the Legislature, and so enforced. If this be not the rule then the Legislature may say one thing, and the courts say another, and the citizen could never know what he must do or avoid until the courts have said what it means.

The language is, and the mandate is unmistakable, "upon failure to comply strictly with *any* provision

of the two preceding sections, (the other not being before us, the one quoted being alone involved), *then* such railroad company shall forfeit and pay the sum of one hundred dollars, and that on any trip. This is as plain as the other. It is the moment there is a failure to comply strictly the forfeiture is incurred—*then* the right accrues to some one to sue. There can be no doubt of this proposition.

Now suppose a failure at the three first stations on a trip—at the first a passenger stops supposing the train will remain fifteen minutes, but it leaves in five, and he is left. He immediately sues the company before a justice of the peace, and so on at each station the same thing occurs—what shall be the measure of recovery? Can each recover the hundred dollars? If so, why? Because the forfeiture of that sum had been incurred the moment the act is not complied with. It is impossible to avoid this result unless you hold that the first man that sues is to recover one hundred dollars, and this shall cover all subsequent violations. If this rule be adopted, then how far shall it reach, and what length of time shall it cover?

If, however, all three can recover, that is, each for a single completed act, then we are compelled to say the company has violated the law three times, each failure a violation, when sued for the act by different individuals at different times, and as any man can sue for the penalty, on the view of two of the judges, my brothers Cooper and the Chief Justice, why one man may not recover on different causes of action

complete of themselves, as well as a dozen separate individuals, is what I am unable to see, even should he be required to sue in separate actions. A man has six different notes due for one hundred dollars each. If he assigns them to six different men, each may sue on the note he has, because it is a complete cause of action. But the theory of my brother Cooper, if applied to such a case, would hold that if he sued himself he could only recover on one note, and the others be for nothing held. I know my brethren would not hold this, but the logic of the opinion involves it, or else you must show an element differentiating the case before us from the one supposed. None can fairly be shown, as I think. The note is but an obligation to pay, say one hundred dollars, and gives a completed right to that sum in the holder, because the *law* will enforce it, and gives the right of recovery on it. The same is the case here, the law gives the right to recover one hundred dollars for each failure to comply with the statute. It is to be recovered as penalties are recovered by the old action of debt at common law, with us in both cases, on the statement and proof of the facts of the case, showing the legal right.

Let us look for a moment at the principle held by the opinion of my brethren Cooper and Deaderick, as given in the syllabus of his opinion, drawn by Judge Cooper: It is, "under the act of 1865, (Rev. Code, sec. 4927 *b*, *c* and *d*), which makes a railroad company liable to forfeit and pay a penalty of $100 upon a failure of the company, during any one trip

of the passenger cars, to announce the stopping place or station at which the train stops, only one penalty can be recovered up to the time of bringing the suit." That is to say, only one penalty can be recovered for two hundred and forty failures, as in this case. But in this case the judgment is that he may recover one hundred dollars, and may select any one count of his declaration, and recover on that if he prove his case.

I submit that if any plain man should read the statute, and then what is thus held, if he would not be compelled to conclude that in this case the Legislature had enacted one thing and the court another. To test this: if under the common-law doctrine of implied repeals of statute, by approximately enacting a different rule, the Legislature had enacted that for every failure to announce the station where a train stops on a trip the company shall forfeit and pay one hundred dollars to whoever shall sue for the same, and then a subsequent Legislature should enact a law, "*Be it enacted, etc.*, that hereafter when a railroad company shall fail on any trip to announce the station whenever the train shall stop, that one hundred dollars shall be forfeited, and recovered by whoever may sue, and this shall be for all failures incurred before bringing suit," if the latter statute would not be a repeal of an essential feature of the former? If not, it is because the language of the statute cannot be antagonized or inconsistent with another, as I think. My learned brethren see clearly, no doubt, the grounds of these views, but I am unable to make consistency with the statute out of these.

The logical result of this opinion is, that a hundred violations of the requirement of the statute, or rather two hundred and forty, as in this case, only incurs one penalty, where one man sues for the failure to comply with the statute. Concede that as now settled, and I ask, how will it be if two hundred and forty men should each sue in separate cases? Again, how is it that one case of violation to be selected by plaintiff, and he recover for that. Is that one violation any more heinous than the other two hundred and thirty-nine? If so, why and how? Shall one violation give a penalty of one hundred dollars, and two hundred and forty no more?

But the result of that opinion goes even further necessarily, for it involves, and it cannot be avoided or evaded, the proposition that these separate violations may occur, and did in this case necessarily occur, on separate trips of the trains, for the train could only pass and stop once on each trip, or on a single trip, and so we have the statute practically to mean that the railroad companies may violate the statute every day in the year, or even for five years, for if two hundred and forty times incurs but one penalty, a thousand would incur no more, and yet pay only one hundred dollars, certainly in the case where one man shall sue for the violations, or how it would be if a man should sue in each case, I am not able to say, and think my brethren will find it difficult to tell. One violation incurs the same penalty as two hundred and forty, and of necessity it follows a thousand would give the same result. The result is, as I think, the

statute is practically repealed. It might be interesting to settle the question suggested as to what would be the result if a separate person should sue for each violation or failure to comply with the law. As to the New York cases cited, I have but to say that the case of *Fisher* v. *New York Central Railroad*, 46 N. Y., 644–8, I have examined, and I see no similarity in the two statutes, nor objects and purposes. The opinion of the court in that case, as expressed in the reasoning of the judge on such a case as is now under consideration, sustains precisely the views I have maintained, for which numerous cases are cited. The statute involved was held to be a remedy given to encourage parties to sue who had been compelled to pay over fare, and the fifty dollars compensation to encourage suit for this purpose. No such feature is found in this statute, no such purpose to be subserved.

I have only to say, that with proper deference and respect for the courts of a sister State, they are no authority when I am called on to construe an act of my own State Legislature, if they require me to disregard the plain language of that body. If any thing in the cases cited does sustain the view combatted, (as I do not think they do when taken in connection with the cases then under consideration) they are simply unsound; my judgment does not approve, and I am compelled to stand by my own opinion. The consideration that I have felt of most weight in this case is, that so far as the plaintiff is concerned there is no merit in it, and a large recovery would be had

on my view of the law. But the answer is, that there is no merit in the same sense in any case where a common informer sues, as in all cases of a *qui tam* action. But this consideration loses all its force when we remember that no penalty can ever be recovered if the law has not been violated. The violation is the act of the defendant, and why a railroad corporation shall violate a plain law, and then not pay the penalty imposed by law, and to the party the law gives that penalty, I do not see. If the party fails to prove a violation, he will pay costs and attorney's fees for his pains. If he proves the violation, then the recovery is legally due, and I will give it. If the statute is not a good one let the Legislature change or repeal it. But until then it must be enforced, or the law of the land is trampled under foot. I cannot assent to such a result—whether the amount be great or small—nor does this affect the proper legal result the weight of a feather. I but add, that I am equally clear that the demurrer does not raise the question on which the court has acted, and that we ought not to have decided any thing except what the court below had ruled on.

A word only as to the view maintained by Judges Turney and Cooke. It is, as I understand it, that the penalty is given for the benefit of the passengers on the cars alone—certainly that none but a passenger can sue. This must go on the idea that the passenger who is inconvenienced by the failure to comply with the regulations required by the statute, is wronged, and has his remedy to redress this wrong. But it is

also held that only one can sue, and not every passenger, or every one injured. The last would have led to consequences that could not be justified—that is, if any passenger could sue. It might be worse than the present case on the companies. This view seems to me not sustained either on principle or from the language of the statute. The language is, the company failing to comply "strictly with the provisions," shall forfeit and pay the sum of one hundred dollars, recoverable before any court having jurisdiction thereof, one half to be paid to the person suing, and the other half to go to the common school fund of the State." How this language is to be limited so that only a passenger can sue, I am unable to see. The statute is either a penal one, or is intended to be compensatory to passengers injured. If penal, then it would be a requirement, as I think, never heard of before in such a statute, that only a passenger on the train should be entitled to enforce it. They generally would be the persons least likely ever to do so of all others, as such passenger would not probably live at or desire to remain at the station long enough to prosecute such a suit.

But if it be compensatory, which, I take it, is the view underlying the opinion—then, on what principle it can be given to only one man is beyond my ken to see. Who shall it be? The first man that sues? It may be he is the man not injured in the slightest. The station may be his home, and he ready to step out without notice. But why the first man that sues shall be alone entitled to compensation for

a wrong equally affecting all the other passengers desiring to stop at that station, it would be difficult to see. Why the compensation should be just one hundred dollars, one-half to the first man that sues, and the other to the common-school fund, is still more difficult to see. The "common-school fund," I take it, is not likely to be injured by any failure to comply with the requirements of the statute—why give compensation to it? It is not a *passenger*.

I only add, that it is obvious the views of the two opinions are entirely antagonistic to each other. The one holds the statute penal, the other compensatory. If the first be correct, the difficulty is, why confine the right to sue to a passenger? If the latter, then why to the first man that sues, and give half the recovery to the "common-school fund" that is entitled to no compensation, and then only allow compensation to one man, while others equally injured go uncompensated?

For these reasons I am compelled to dissent from both views.

GEORGE KENNEDY *v.* MARY R. KENNEDY.

RECORDS OF COURT. *Duty of clerk.* The clerk is the legal custodian of the records of his court, and should preserve them intact; and if in fact the record has been altered improperly in any respect, his duty is to certify the record as it originally existed, ignoring the change.

FROM HENRY.

Appeal in error from the Circuit Court of Henry county. C. ADEN, J.

COLE & SWEENEY and R. K. WARD for plaintiff.

—— ——— for defendant.

COOPER, J., delivered the opinion of the court.

The transcript of the record originally filed in this case included a bill of exceptions which did not show that it contained all the evidence. The clerk of the court, who made out and certified the transcript, embodied therein a statement that the bill of exceptions on file in his office did have at the end of it the usual formula, "this was all the evidence in the cause," but that these words had been put there by the judge of the court after the adjournment of the term at which the suit was tried. Upon an oral suggestion of diminution made by the defendant's counsel, the usual general order for a more perfect record was made. In response to this order, the clerk has sent

up the bill of exceptions with the above clause inserted at the end.

The clerk is the legal custodian of the records of his court, whose duty is to preserve them if possible from all alteration or addition. If in fact they have been changed in any respect improperly, his duty is to certify the record as it originally existed, ignoring the changes. The power of the judge over the record ceases upon the adjournment of the term, and he has no more authority than any third person to make any alteration or addition. He cannot even sign a bill of exceptions after the adjournment of the term, although the signature may have been inadvertently omitted: *Jones* v. *Burch*, 3 Lea, 747. If, therefore, the clause in question was added after the adjournment of the term, the clerk acted properly in omitting it, and his first transcript was correct.

In view of the facts, and that the clerk may have been misled by the general order made upon the suggestion of diminution, we think that between the two records sent up, the first transcript should be taken at present as the true record, but with leave to the counsel of the appellant to renew his suggestion of diminution upon satisfying us that he has good ground for insisting that the clause in controversy was a part of the record at the adjournment of the trial term. An order to this effect will be entered on the minutes, and a copy of it sent to the appellant's counsel by mail.

D. W. LAKE and WIFE *v.* J. S. McDAVITT *et al.*

1. JURISDICTION, COUNTY COURT. *Minors.* The jurisdiction of the county court over infants and their estates, and over the appointment and removal of guardians, is purely statutory, and to that extent the jurisdiction of the chancery court is concurrent.

2. JURISDICTION, CHANCERY COURT. *Same.* The court of chancery is a superior court, possessing a common law jurisdiction over infants and their estates, in addition to the jurisdiction conferred by statute, and may take control of an infant's property, and in the absence of a general guardian, appoint a limited guardian of the person or estate, or a custodian or receiver of the property.

3. GUARDIAN, GENERAL. *Duties.* But the general guardian of our statutes, who is required to give a personal bond with good security for the performance of duty and protection of the ward, is always to be preferred, and whenever appointed is entitled at once to demand and receive the property of the ward from the chancery court, or its special appointee.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W. W. McDOWELL, Ch.

HARRIS, TURLEY & FREEMAN for complainants.

CRAFT & COOPER for defendants.

COOPER, J., delivered the opinion of the court.

On April 16, 1883, Thomas B. Turner died intestate, leaving five children all under age, but the oldest of whom is the wife of complainant, D. W. Lake. The defendant, J. S. McDavitt, became administrator of

the estate. The intestate, in addition to the realty described in the bill, left a large personal estate of over $100,000, consisting of choses in action, stocks and bonds. Of the stocks and bonds, there are $30,000 of stock in the Union and Planters' Bank; $12,000 of stock in the Phœnix Insurance Company, and $15,000 bonds of the Mississippi & Tennessee Railroad Company. There has been no settlement of the administration as yet. This bill was filed April 26, 1884, by Lake and wife against McDavitt, as administrator, and the infant children of the intestate, stating that owing to the amount of the personal estate, and the bond required by law, no person can be found who is willing to become guardian of the infants, and that the bond of the public guardian is inadequate to cover the estate. The bill further avers that the complainants are the nearest of kin of the infant defendants, who are living with them, and the only relations of the infants in this State to whom they can look for the care and protection of their interest in this matter. The bill further states that the stocks and bonds mentioned are safe and valuable investments, and that they might be so placed in the custody and control of the court as to secure their safe keeping, without danger of their transfer, and that the monies of the estate as they come in might be invested under the orders of the court. It is then suggested that, if this plan should be adopted, the complainant, D. W. Lake, believes, if appointed guardian, that he could give bond sufficient to cover the income of the wards, and as much of the corpus as might be on hand at any one time for

investment. The complainant adds that he does not seek the appointment, and is willing the court may select any other suitabte person who will become guardian. The bill is filed that the court may take control of the property of the infants, and that the settlement with the administrator may be had in the court.

The infants were brought into court by service of process, and put in a formal answer by guardian *ad litem* appointed by the court. The defendant, McDavitt, filed an answer admitting the facts to be as set out in the bill. He pleads, however, that the chancery court has no jurisdiction to grant the relief sought, and that the jurisdiction, if it exists any where, is in the probate court of Shelby county. And he adds that the probate court has already claimed and exercised the jurisdiction in the case of the children of one James S. Houck, deceased, of whose children his own intestate, Thomas B. Turner, was testamentary guardian, as well as executor of their father's will. And the defendant appends a transcript of the proceedings of the probate court in that case as an exhibit to his answer. He asks the protection of the court against an improper exercise of jurisdiction.

The chancellor, upon final hearing without any proof except the exhibits, or referenee, was of opinion that he had jurisdiction of the cause, and so decreed, assuming the custody and control of the persons and estates of the infant defendants. He appointed D. W. Lake, upon his giving bond, with two approved sureties, in the penalty of $25,000, conditioned as required by law, guardian

of the persons of the infants, and of such parts of their estate as is placed in his hands by the decree, or by any subsequent decree made in the cause. The decree provided that the amount of the bond should be subject to the control of the court, and might be changed at any time so as to protect that part of the estate of the ward in the guardian's hands. The guardian was to act under the instructions of the court, and to be amenable to its orders, and was required to make reports to, and settlements with the court. The court then fixed a reasonable amount of money to be paid by the administrator to the guardian for each of the wards. From this decree, except so much of it as required the administrator to pay the amount ordered for the support of the infants, the administrator appealed.

The Code, sec. 2493, is: "The county court shall have full power to take cognizance of all matters concerning minors and their estates; and, whenever it appears necessary, shall appoint a guardian for every infant within its jurisdiction; but the powers of the chancery court over such estates are not hereby abridged." By the Code, sec. 4299, the chancery court is vested with jurisdiction, concurrent with the county court, of the persons and estate of infants, and of the appointment and removal of guardians. And by the Code, sec. 4279, "the chancery courts shall continue to have all the powers, privileges and jurisdiction, properly and rightfully incident to a court of equity by existing laws."

The jurisdiction of the county court over infants

and their estates, and the appointment and removal of guardians, although general, is purely statutory. To that extent the jurisdiction of the chancery court over the same matters is concurrent with the jurisdiction of the county court. The use of the word "exclusive" in speaking of the jurisdiction of the county court in the matter of appointing and removing guardians is manifestly an inadvertence in the opinion in *Webb* v. *Fritts*, 8 Baxt., 218, if the word is not a misprint, as it probably is. But the chancery court is, in addition, vested with "all the powers, privileges and jurisdiction incident to a court of equity by existing laws," that is by the statutory and common law of the State. It is a superior court as contradistinguished from a court of peculiar, special and limited jurisdiction: *Hopper* v. *Fisher*, 2 Head, 254. It possesses, except where changed by statute, the jurisdiction which was exercised by the Lord Chancellor of England, as an equity judge, denominated his extraordinary jurisdiction: *Oakley* v. *Mitchell*, 10 Hum., 254; *Green* v. *Allen*, 5 Hum., 170; *Franklin* v. *Armfield*, 2 Sneed, 306; 2 Sto. Eq. Jur., sec. 1335. The jurisdiction extends to the case of the person of the infant so far as necessary for his protection and education; and to the care of the property of the infant, for its due management and preservation, and proper application for his maintenance: 2 Sto. Eq. Jur., sec. 1341. There can be no doubt of the jurisdiction of the chancery court to take control of the persons and property of the infants in this case, and to make the appointment of guardian as was done, or of a

suitable receiver or custodian in the absence of a guardian.

There is some doubt whether the bill which has been filed is in the name of the proper parties. The bill ought, perhaps, to have been in the name of the infants by their next friend, for then there would be some person responsible for the propriety of the action, and the truth of the facts: *DeCosta* v. *Mellish*, 2 Swanst., 533. And is properly against the person in possession of the infant's property: *Johnstone* v. *Beattie*, 10 Cl. & F., 42. But, inasmuch as the complainant suggests his own appointment as guardian, it may, under our practice, be treated as a petition for that purpose.

It is proper to add that the general guardianship of our statutes, based upon a personal bond in double the amount of the ward's personal property and income, is always to be preferred to any form of limited guardianship by the chancery court, and the last must always give way to the other. If at any time a general guardian for these infants, or any of them, shall be appointed accordingly, such a guardian will be entitled to demand and receive the property of the ward from the chancery court or its limited appointee. The county court has no power to appoint any other than a general guardian. The decree of the chancellor will be affirmed, and the cause remanded. The costs of this court will be paid by the defendant, McDavitt, as administrator, and will be allowed him as a credit in his settlement of the interests of the infants in the estate.

MEMPHIS CITY RAILWAY COMPANY *v.* JOHN LOGUE, Administrator.

DAMAGES. *Charge of court.* In an action for the recovery of damages for a personal injury against a street railroad company the court charged as follows: "It is the duty of the defendant to furnish lights on its cars at night such as will enable its drivers to see objects ahead on the track, with the aid of the street lights, in time to avoid an accident." Held, erroneous.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

GEORGE GILLHAM for Railway Company.

TAYLOR & CARROLL for Logue.

COOPER, J., delivered the opinion of the court.

Action of damages brought by Logue, as administrator of Posey Webb, deceased, against the railway company for injuries to the intestate by one of the company's street cars resulting in her death. The verdict and judgment were in favor of the plaintiff below, and the company appealed in error. The Referees report in favor of affirmance. The exceptions of the company to the report are directed to alleged errors in the charge of the trial judge.

The railway company owns and operates a street railroad in Memphis, the cars being drawn by horses

or mules. The intestate of Logue, a colored child of the age of two years and nine months, was killed by one of these cars on the night of June 22, 1881, about eight o'clock in the evening. The night was dark, making it difficult to see a small object on the track, even at the distance of a few feet, although larger objects, such as a man pushing a baby-carriage, could be seen much further off. The father of the intestate had put a younger baby in a baby-carriage, and trundled the carriage along the track. The intestate followed the father, and, although ordered back by him, got upon the railway. She was dressed in dark colored clothing. The company's car was the common street car properly equipped with lamps on the front end, such as are used on all the street cars of the city, lighted and burning. The driver was standing on the front platform in his proper place, holding the reins in one hand, and with the other hand on the handle of the brake. He was looking ahead, and saw the father of the intestate with the baby-carriage, but did not see the child until he noticed the mules veering to one side, and then saw a crawling object without being able to distinguish what it was. He immediately reined up the mules, put on the brakes, and stopped the car in time to prevent the wheel passing over the child, the injuries from which it died being probably inflicted by the single-tree and the brake.

The part of the charge principally excepted to is this: "It is the duty of the defendant to furnish

lights on its cars at night, such as will enable its car-drivers to see objects ahead on the track, with the aid of the street lights, in time to avoid accidents." The plaintiff in error insists that the charge is too stringent.

While a common carrier of passengers is not an insurer, he is bound to the diligence which a good specialist in his particular line of business is accustomed to exert. His care and diligence must be in proportion to the risk of the machinery he employs and of the work he undertakes: Whar. on Neg., sec. 627. The same degree of care is not required of the carriers of passengers upon street cars drawn by horses as of railway companies whose cars are drawn by steam. The public have an equal right with the company to travel on the streets, and therefore the company must, in using its franchises, exercise such care and caution for the purpose of avoiding accidents and endangering property and persons as a reasonable prudence will suggest: 5 Wait's Act. & Def., 343. In general, the same degree of care as to pedestrians is required of them as of the driver or owner of any other vehicle: *Unger* v. *Street Railway Co.*, 51 N. Y., 497. Owing to their momentum and noiselessness, the cars are generally required to use bells and display lights: *Johnson* v. *Railroad Co.*, 20 N. Y., 65; *Shea* v. *Railroad Co.*, 44 Cal., 414. These precautionary measures seem intended to put pedestrians on their guard rather than to aid the company in protecting them. But there can be no doubt that the company is bound to operate its cars in such a man-

ner, if possible, as to injure no one, and to this end to have the ordinary means such as are usually found adequate and safe: Whar. on Neg., sec. 639. In view of the recognized principles, the question is whether the requirement of the charge does not go beyond the requirement of the law. It requires the defendant company to furnish such lights in its cars at night as will, under all circumstances, with the aid of the street lights, enable its drivers to see objects on the track in time to avoid accidents.

The charge is, like so many charges which come before us, open to the objection that it undertakes to lay down a general proposition of law instead of confining the law to the facts of the particular case. And the proposition itself is open to the objection that it requires a degree of light which might, under some circumstances, transcend not merely what is usually found adequate and safe, but the bounds of science. Even in the case of steam railroads, the companies are only required to avail themselves in the night time of such means and appliances as might be reasonably obtained to enable their employees to see ahead on the track: *Nashville & Chattanooga Railroad Company* v. *Smith*, 6 Heis., 174. And where the night was very dark, and the headlight of the steam engine was so obscured by rain that the look-out could not see any considerable distance ahead, whereby an accident occurred, this Court said: "We cannot admit that if the light becomes obscure from natural causes, without any defect in the light and appurtenances, without any fault on the part of the employees, that

in all cases as matter of law, the company is to be liable for the consequences": *Louisville & Nashville Railroad Co.* v. *Melton.* 2 Lea, 262. The instruction now under consideration would, as a general proposition, hold a street railroad company to a greater strictness than would be required of a steam railroad company. The facts of the case did not require the enunciation of such a proposition. But we cannot limit the language to the actual facts.

The exceptions to the report of the Referees will be allowed, the judgment below reversed, and the cause remanded for a new trial.

MARY BORO and JAMES BORO *v.* MARY HARRIS.

1. CHANCERY PLEADINGS AND PRACTICE. *Minor. Ejectment.* An infant was, by his general guardian, made a party defendant to an action of ejectment, upon the verdict in which the lower court rendered judgment in his favor, and this court against him after he came of age, but without any entry showing appearance by him as an adult, and he filed a bill for the recovery of the land within three years after he came of age: Held, that the judgment in ejectment was no bar to the new suit.

2. SAME. *Appearance by attorney.* A judgment resting upon the unauthorized appearance of an attorney, may be annulled in equity upon a bill filed for the purpose.

3. EJECTMENT. *Equitable right.* A recovery in an action of ejectment only determines that the successful party has the better legal title, and will not prejudice the equitable rights of the losing party.

4. PARTNERSHIP. *Levy on interest of partner.* If, in legal effect, a partnership be created between parties, all that an individual creditor of one of the partners could reach by a levy of an execution on the interest of that partner in partnership realty, or that a purchaser under the execution sale could acquire, would be the interest of the partner after a partnership account.

5. SAME. *Action of partner to avoid debts.* If a person, having the capital, hold out two other persons as the only partners in a business, owned and conducted exclusively by him, in order to avoid certain claims which were likely to come against him, it is a point of grave difficulty, not now determined, how far such person could enforce against the other parties in possession the consideration of the conveyance of property to them bought with the ostensible partnership assets.

6. SAME. *Abandonment. Purchaser with notice.* If such person took possession of real estate thus bought, remaining in possession until his death two years thereafter, and then one of the ostensible partners, who is also the guardian of the infant children of the deceased, take possession, and use the rents partly to pay partnership debts and partly for the benefit of his wards, and after the debts are paid exclusively for their benefit, the other partner never taking possession nor claiming any interest therein, and both afterwards joining in a conveyance of the realty to the children, there would be an abandonment of all claim except as trustee for the children, and a purchaser at execution sale of the interest of the partner who was never in possession, with notice of the equity of the children, would only acquire the legal title subject to the equity.

7. EXECUTION SALE. *Caveat emptor.* The rule of *caveat emptor* applies to a purchaser at execution sale, and if, at the time of sale, the purchaser has actual notice of an equitable right in a third person, especially if possession be held under that right, he will take subject to the equity; and *a fortiori* if he pay for the purchase by a credit on an antecedent debt.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W. W. MCDOWELL, Ch.

H. C. KING, W. H. HEISKELL and FLIPPIN & FLIPPIN for complainants.

METCALF & WALKER for defendant.

COOPER, J., delivered the opinion of the court.

The contest in this case is over a lot, on which is a storehouse, in the city of Memphis. The complainants claim the lot as the children and heirs of James Boro, deceased. The defendant holds under a sheriff's deed by virtue of a judgment and execution sale of the lot as the property of Joseph Boro, a brother of James Boro. The chancellor, on final hearing, dismissed the bill, and the complainants appealed.

The lot was bought and paid for by James Boro on May 15, 1862, who caused the conveyance to be made to "Joseph Boro and George W. Wible, firm of J. Boro & Co." The purchase money was paid out of the assets of the firm, and there can be no doubt that James Boro was the principal owner of these assets, although the firm business was conducted in the names of Joseph Boro and G. W. Wible, who were held out to the world as the sole partners. The deed to J. Boro & Co. was executed on the 17th of May, 1862. James Boro died in February, 1864, leaving the complainants, then infants, his only heirs. He had been in possession of the lot up to his death. Shortly afterwards the premises on the lot were seized by the United States military authorities, and used as a military prison until some time in 1865. When vacated by the military, they were taken possession of by G. W. Wible, who rented them, using the rents partly for the payment of the debts of J. Boro & Co., and partly for the support and education of the

complainants. Wible, and one Jenny, had been appointed and qualified as guardians of complainants. So far as appears, Joseph Boro never claimed or had possession of the lot. On May 17, 1871, Joseph Boro and Geo. W. Wible conveyed the lot by deed to complainants.

On October 14, 1865, the defendant, Mary Harris, leased to Joseph Boro and others a storehouse in Memphis for several years, taking their notes for the rent. One of these notes, payable January 1, 1869, for $2,500, was sold and endorsed by Mary Harris to one Reeves, who sold and endorsed it to D. H. Townsend before maturity. The note was protested for nonpayment, and the liability of Mary Harris as endorser fixed by notice. After the maturity of the note, Townsend called upon Wible for information as to the financial condition of Joseph Boro and the other makers of the note, and was told by him that they were worth nothing, and that the property which stood in the name of Joseph Boro did not belong to him, but to James Boro's heirs. Townsend, thereupon, notified the attorney of Mary Harris that he intended to look to her for payment. At the request of the attorney, and upon an agreement that Mary Harris would confess judgment on the note, he agreed that the attorney might bring suit in his, Townsend's name, against Joseph Boro on the note. Suit was accordingly brought by said attorney, and judgment recovered May 11, 1870. Execution issued on this judgment, and was levied upon Joseph Boro's interest in the lot in controversy. On January 11, 1871, that interest was

sold by the sheriff under the execution, and bid off by Mary Harris, who paid the costs, and sunk the residue of her bid on the judgment recovered in Townsend's name for her benefit. The sheriff made her a deed July 8, 1871. On June 26, 1871, she confessed judgment on the note in favor of Townsend, and this judgment was satisfied by a sale of her property, which she subsequently redeemed.

On the 16th of August, 1872, Mary Harris brought an action of ejectment at law against G. W. Wible, John Linte and Jo. Flynn, to recover possession of the undivided half of the lot in controversy, which she claimed under the execution sale and purchase as the property of Joseph Boro. Linte and Flynn were temporary tenants under Wible, and the only defense was made by him. The suit was against Wible individually as having the possession, but there can be no doubt that he considered himself as defending for the complainants, who were still under age, and for whom he and Jenny were the guardians. His counsel so understood the case, and expected to defend upon the title of the wards. On September 23, 1875, while the ejectment suit was being tried, the following entry was made on the minutes of the court: "In this cause, it appearing to the court by admission of parties in open court that defendant, G. W. Wible, is the regular statutory guardian of James Boro, infant child of James Boro, deceased, and that he, as such guardian, and Mary Boro, another child of James Boro, now adult, are and were in possession of the lot of ground sued for at the commencement of this

suit, and that the other defendants named are the tenants of the said Mary and of said James by his guardian; and thereupon, upon application of defendants and said Mary and James Boro, with the consent of parties, the said James and Mary Boro were made also defendants hereto, and the said Wible is appointed guardian *ad litem* to defend for the said James; and thereupon said Mary, and James by his said guardian, appeared by counsel, and for plea adopts the plea heretofore filed in this cause upon which issue is joined." The complainant, Mary Boro came of age April 5, 1874, and complainant, James Boro, October 29, 1875.

By consent of parties, the jury found a special verdict on certain issues, other matters being left to the decision of the court. The jury found as facts that James Boro was not a member of the firm of J. Boro & Co., but was using the names of Joseph Boro and Geo. W. Wible for the sole purpose of transacting his own business, owned and conducted exclusively by himself; and that this was done in order to avoid claims which were likely to come against him. The trial judge, upon these findings and the matters reserved, gave judgment for the defendants. The plaintiff appealed in error to this court. The cause was transferred by consent of parties to the Commission Court, and the judgment was reversed, and judgment rendered in favor of the plaintiff in June, 1877. The present bill was filed June 16, 1877, to enjoin the execution of the writ of possession issued on that judgment, and for relief. An injunction was granted,

which was afterwards dissolved, and Mary Harris put in possession of the moiety of the property.

Treating the bill as virtually an action of ejectment for the recovery of the possession of the property, the first defense relied on is the *res adjudicata* of the previous action at law. At common law, however, the verdict and judgment in an action of ejectment were not conclusive upon the parties, and a new action might be brought by the losing party, and so on as often as he saw proper. The only remedy for a successful suitor was in the court of chancery, after a number of favorable verdicts, to prevent vexatious litigation. The Code now provides, sec. 3252, that a judgment in ejectment "is conclusive upon the party against whom it is recovered, not under disability at the time of recovery, and all persons claiming under him by title accruing after the commencement of the action." It further provides, sec. 3253: "If the person against whom the recovery was had is under the disability of infancy, coverture or unsoundness of mind at the time of the recovery, the judgment is no bar to an action commenced within three years after the removal of such disability." The present bill was filed within three years after the trial of the action of ejectment at law, and only a few days after the final action of this court in the appeal in error taken therefrom. The complainant, James Boro, was an infant at the time of the trial, and the verdict of the jury. It is true, the judgment of the trial court was in his favor, and it was only on the final hearing in this court that the judgment was adverse.

But the judgment was based on the verdict of the jury, and was such as the trial court ought to have rendered. If the recovery, within the meaning of the statute, be considered as had at the time of the judgment in the trial court, a point about which there may be some doubt, the judgment would be no bar. And the record of the ejectment cause does not show any other entry or proceeding making him a party to the action. The present suit, treated as a new action of ejectment, may therefore be sustained as to James Boro.

The complainant, Mary Boro, rests her right to sue upon the ground that the appearance entered in her name in the ejectment suit was without any authority from her, and the present bill is drawn with a view to impeach and obtain relief from that judgment upon this ground. The weight of American authority now is that a judgment resting upon the unauthorized appearance of an attorney, may be annulled in equity, upon a bill filed for the purpose: *Shelton* v. *Tiffin*, 6 How., 163; *Harshey* v. *Blackmarr*, 20 Iowa, 161; *Gifford* v. *Thorn*, 1 Stock., 702. Our courts have followed the current: *Jones* v. *Williamson*, 5 Cold., 371; *Coles* v. *Anderson*, 8 Hum., 489. The record leaves no doubt that the eminent counsel of the defendants in the ejectment suit considered himself employed by Wible as guardian of the children of James Boro, and authorized by Wible to make them parties if he deemed it advisable. It is equally certain that Wible himself looked upon the suit as being against him as guardian, and authorized the substitution

of the names of the real owners as defendants. He was in court when the order of substitution was made. The proof, however, is all one way, that Mary Boro was not actually consulted in the matter, and did not authorize the act. Wible testifies that he never obtained her consent, and the counsel says he never saw her. Mary Boro swears that she was not aware of the fact that her name had been used until after the final disposition of the case in this court, and her uncle, Wm. Hidell, to whom she had given a power of attorney to act for her after she came of age, deposes that he was ignorant of the fact until after the final judgment. All of these parties knew, it is true, that the suit was pending, and that it involved the title to the property now in controversy, but mere knowledge of these facts, and even active participation in the conduct of the suit, would not affect a person's rights unless he is an actual party: Code, sec. 3252; *Boles* v. *Smith*, 5 Sneed, 105; *Hillman* v. *Chester*, 12 Heisk., 34. The judgment in the ejectment suit is not, therefore, a bar to the relief now sought, even if the bill be treated as a pure ejectment bill.

The legal title to the lot in controversy was taken, it will be remembered, to Joseph Boro and Geo. W. Wible, as constituting the firm of J. Boro & Co. If Mary Harris acquired the legal title of Joseph Boro by virtue of the execution sale under the Townsend judgment, she acquired it before Joseph Boro and Wible made their conveyance of the lot to the complainants. All that the action of ejectment could, in any event, determine, was that Mary Harris had the

better legal title. The equitable rights of the complainants, if they have any, as against Mary Harris, would remain unaffected by that recovery. These might be set up in chancery even after a judgment against them at law in an action of ejectment to which the complainants were actual parties.

It is very clear, however, that the complainants have no right to call in question the validity of the defendant's judgment against Joseph Boro by reason of any equities between defendant and Joseph Boro, growing out of the consideration of the note on which the judgment was rendered, the mode in which the note was sued on and judgment recovered, or the state of mutual accounts or indebtedness between them. These are matters which Joseph Boro himself can alone contest. If he has so acted that the proceedings are valid against him, no other person, in the absence of fraudulent collusion, can call them in question. The defendant, Harris, has acquired the legal title and interest of Joseph Boro, whatever they may be, in the lot in controversy.

As early as 1853, James Boro seems to have made a general assignment of all his property to one Jenny, who was afterwards a partner of James Boro, then the book-keeper of J. Boro & Co., and finally one of the guardians of defendants. Jenny admitted that he never acted under the assignment, except, perhaps, to join in the conveyances of some of the property made by James Boro. He was afterwards in partnership with James Boro for two or three years, until 1858, when Boro bought him out. The firm name was J.

Boro & Co. In 1858, James Boro conducted the same business in the same firm name, the ostensible partners, as held out to the world, being his brother Joseph Boro, and his brother-in-law, Geo. W. Wible. The reason for this arrangement seems to have been, as expressed by Jenny when examined as a witness, that he could not hold property in his name on account of some New Orleans claims, growing out of the management of a steamboat of which he was at one time the owner, which he was afraid he would have to pay, and upon which suits were, perhaps, pending in Louisiana. There is in this record no proof of the existence of such claims, nor of the pendency at any time of any suits. But the fact of such apprehension on his part is fairly exposed by the testimony, and affords the only solution offered for the mode adopted in conducting his business. Neither Wible nor Joseph Boro had much, if any capital, and seem to have worked upon a salary, and the payment of family expenses. The business was continued under the arrangement made in 1858 until the spring or summer of 1862, when it was virtually terminated by the exhaustion of the stock by sales, and the course of the civil war. Wible says that he expected to share in the profits of the business, in addition to his salary, but there were no profits, and the assets in 1862 belonged to James Boro. The lot in controversy was bought and paid for with these assets, and the title made to the ostensible members of the firm.

Wible and Joseph Boro being held out to the world

as the only partners of J. Boro & Co., it is very clear that they became partners as to third persons, and personally liable for the firm debts, and entitled to look to the partnership property for reimbursement. It is equally clear that James Boro was in reality a silent partner, and liable as such. Irrespective of the intention of the parties, the legal effect of what was done was to create a partnership between them, and any property bought with partnership assets became at once partnership property, and the title was properly taken to the firm. In this view, all that an individual creditor of either one of the partners could reach by the levy of an execution, or which a purchaser could acquire under the execution sale, would be the interest of that partner, dependent upon a partnership account: *Haskins* v. *Everett*, 4 Sneed, 531. And if the ostensible partners had in fact no interest in the partnership property, the creditor or purchaser, if there were nothing else in the case, would take nothing: *Kelly* v. *Scott*, 49 N. Y., 599; *Hillman* v. *Moore*, 3 Tenn. Ch., 454. Upon the theory of a partnership, real or ostensible, the defendant acquired, by her purchase under the Townsend judgment and execution, only the legal interest of Joseph Boro in the property in dispute after an adjustment of the partnership accounts. And either she or the complainants, as the heirs of James Boro, could come into equity for the taking of the accounts and adjustment of their rights, notwithstanding a recovery in ejectment at law upon the legal title.

The jury, upon the trial of the action of eject-

ment, found as facts that James Boro, at the time of the purchase of the lot in controversy, was not a partner in the firm of J. Boro & Co.; that he was using the names of Joseph Boro and Geo. W. Wible for the sole purpose of transacting his own business, owned and conducted exclusively by himself; and that he used the names of these parties in order to avoid claims which were likely to come against him. The testimony in that case warranted these findings, and the same findings might be made in this case, although Wible, Jenny and Joseph Boro have, in a manner by no means creditable to them, modified their testimony upon the subject of the New Orleans claims, and their sources of information touching them. The substance of these findings is that there was no partnership, but a mere agency resorted to for the reason stated. The trial court and the Commission court, on appeal, differed as to the legal effect of these findings on the rights of the parties to the action of ejectment, the one rendering judgment for the defendant, and the other for the plaintiff. The point is one of grave difficulty. For, while a conveyance in fraud of creditors, without more, would clothe the grantee with the absolute interest, as between the parties, which might be subjected by his creditors, the authorities are hopelessly in conflict upon the question whether the fraudulent grantor could enforce against the fraudulent grantee in undisturbed possession the ostensible consideration of the conveyance: *Gray* v. *Jacobson*, 55 Miss., —; S. C., 1 Memph. L. J., 64. The consideration of the conveyance in question was the man-

agement of the business entrusted to the agents, the payment of the debts of the ostensible partnership of J. Boro & Co., and the accounting for the net surplus assets.

The case as presented in the record now before us renders it unnecessary to determine the point thus raised in the ejectment suit. The proof is that James Boro took possession of the lot in controversy at once upon the completion of the purchase, and continued to hold the same, claiming and using it as his own until his death in 1864. It was then occupied by the Federal authorities as a military prison until sometime in 1865. Then Wible took possession, and used the rents partly to pay the debts of J. Boro & Co., and partly for the benefit of complainants. After the payment of the debts, he held for complainants exclusively. Joseph Boro, it appears, never set up any claim to the property, nor did he ever have possession of it. And on May 17, 1871, he joined Wible in conveying the lot to the complainants. There was a virtual abandonment by both of the grantees of any title to the property except as trustees for the complainants. The title remained in them subject to an admitted equity, which equity originated by act of the parties before the creation of defendant's debt. And neither they nor complainants knew of defendant's levy until after the sale under it.

The defendant's debt against Joseph Boro was created in 1865, fell due January 1, 1869, and was reduced to judgment in 1870. The suit was brought upon the note by her lawyers, and for her benefit in

the name of the purchaser Townsend, after Townsend had informed the lawyer that the property in controversy did not belong to Joseph Boro, but to the heirs of James Boro. Wible testifies to having given similar information to a son of defendant, now dead, who made inquiry of him as to the facts. But Wible stands in such a questionable attitude before the court by reason of his contradictory statements under oath, that little if any credit should be given to his uncorroborated testimony. Townsend is, however, a disinterested witness. And, inasmuch as the defendant executed a power of attorney to confess judgment on the note in his favor in pursuance of the agreement made by him with her attorney, it is a fair inference that she was advised of Townsend's refusal to sue, or to look to Joseph Boro, and the reason given by him therefor. The judgment was virtually her judgment, and was used by her in paying for the interest of Joseph Boro, when purchased by her at the execution sale.

The rule of *caveat emptor* applies to a purchaser at execution sale in this State. And if at the time of sale the purchaser has actual notice of any legal or equitable right in a third person, especially if possession be held under that right, he will take subject to that right. If he was a creditor antecedent to his purchase, and paid for the purchase by a credit on his demand, he is not a *bona fide* purchaser for value: Freem. on Judg., sec. 366. And, as we have held at this term, it is the settled law of the State that a prior equity will prevail, except in certain cases

falling within the letter or policy of our registration laws, over a subsequent equity and the legal title with notice, or against volunteers with or without notice, a purchaser in satisfaction of an antecedent debt being always treated as a volunteer within the rule: *Anderson* v. *Ammonett*, 9 Lea, 1.

If Joseph Boro was not a partner of James Boro in the business of J. Boro & Co., the conclusion thus reached necessarily ends the litigation. If Joseph Boro were in fact a partner, the defendant by virtue of her purchase might demand a partnership account with a view to ascertain his interest in the property. No such relief is asked in the present suit, and it sufficiently appears in this record that such an account would be of no avail, and it is so adjudged.

The decree must be reversed, and a decree rendered here in favor of the complainants for the recovery of the property, and rents received by the defendant. Under the circumstances the complainants will pay all costs of the cause.

This opinion, delivered two terms ago, is again made the opinion of the court after the rehearing. The exceptions to the report of the Referees are disallowed, and the decree of the chancellor reversed, and decree will be rendered here in accordance with this opinion. The complainants will pay the costs of the entire cause.

13L 59
4pi 336

B. R. G. WARNER *v.* THE STATE.

1. CRIMINAL LAW. *Witnesses before the grand jury. Contempt.* The attorney-general during the term of the court, has no authority to order the clerk to issue a subpœna for a witness to appear before the grand jury to testify as to gaming. If a witness appear under such subpœna and refuse to answer, he is not guilty of contempt.

2. SAME. *Same. Same.* A witness properly subpœnaed before the grand jury to testify in regard to gaming, who refuses to answer touching his knowledge of gaming, although his answer may show his own guilt, is guilty of contempt for which he may be fined and imprisoned.

3. SAME. *Contempt.* A judgment of imprisonment for contempt is subject to revision by the Supreme Court brought up by writ of *certiorari*.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. J. M. GREER, J.

T. W. BROWN for Warner.

ATTORNEY-GENERAL LEA for the State.

TURNEY, J., delivered the following opinion.

The grand jury for Shelby county being organized and in session, the attorney-general, upon his own motion, ordered to be issued a subpœna for the plaintiff in error "to appear before the grand jury to testify and give evidence on behalf of the State concerning his knowledge relative to a bill of *indictment to be preferred* against divers persons for the offense of gaming committed within the said county of Shelby," etc.

It was admitted by the attorney-general that the subpœna was issued by his instructions and not at the instance of the grand jury, and that said Warner was not sent before the grand jury upon any indictment against any individual. Warner was interrogated by the attorney-general and the grand jury "as to whether he knew of any unlawful gaming in the Gayoso Club rooms over his saloon." Refusing to answer, the foreman accompanied him to the presence of the court. The court inquired of the prisoner "upon what ground he based his refusal." He replied that he was president of the Gayoso Club, that there were some sixty members of said club, and that he did not desire to speak of any thing pertaining to the club. That his answer might criminate himself, and therefore he had refused to answer. The court instructed him "that a person was not liable to prosecution for any information given before the grand jury touching any misdemeanor in which he might have taken part, hence he could not criminate himself even if he answered that he had been engaged in said gaming, and that he could not be prosecuted." He still refused to answer and was committed for contempt of court. The case is before us upon a *supersedeas* of the order of committal.

The first question is, was the plaintiff in error before the grand jury as the law contemplates so as to subject him to punishment for a refusal to answer questions? The acts of 1824 and of 1829, carried to Code by sec. 5087, provides: "The grand jury shall send for witnesses whenever they or any of them sus-

pect a violation of the laws against gaming," etc. Here it is not pretended that the grand jury sent for the witness. On the contrary that idea is distinctly and in terms negatived by the record as we have seen. He goes before it without any intimation from it that it or any one of its members suspected a violation of the law against gaming. The power to send for witnesses is conferred alone upon the grand jury. The law conferring such power is in derogation of common law, and must be strictly construed.

Then by what authority does an attorney-general assume to perform the functions and exclusive duties of the grand jury? The mere fact that he is an officer of the court and may visit the grand jury, prepare and present indictments to them, and prepare presentments when directed by the grand jury, does not imply an authority to assume any of the duties assigned by law to a grand juror. If he may assume the office of grand juror for one purpose, why may he not do so for every purpose? If because he suspects a violation of law, he may of himself and of his own motion order a subpœna for witnesses to go before the grand jury to give evidence touching the same, why may not the sheriff or constable who waits upon the grand jury do so? Why may not the judge himself or any attorney for the court assume and practice the power?

It requires a judge, attorney-general, attorneys, clerks, sheriffs, etc., to constitute a court, and each is an officer of the court, so if we construe the law directed to grand juries to include one officer of the

court, we must for the same reason construe it to embrace all officers of that court.

The attorney-general might, as could any other citizen, have communicated his suspicions of a violation of law to the grand jury and induced it to send for witnesses, but because he might have exerted an influence to persuade the jury to exercise its inquisitorial power, it does not follow that he is authorized to employ that power also. Any citizen has the right to suggest or make known to the grand jury that the law is being violated, and upon such suggestion or information, the grand jury may, and perhaps under the statute it would be its duty to, send for witnesses, yet the citizen has no right to have witnesses sent for (upon his bare order to the clerk), to be interrogated by the grand jury upon matters of his suspicion or even knowledge.

That the Legislature did not intend to confer upon attorneys-general the power to order process of subpœna, in the sort of case before us, is manifest from section 5090*a*, by which he is empowered to call upon clerks between terms for process to secure the attendance of witnesses before the grand jury at the succeeding term when, in his opinion, it is necessary to secure the ends of justice and protect the interests of the State.

This provision occurs in the same chapter with sec. 5087, under the title of "Proceedings before the grand jury." The expression of this *one power* is the exclusion of the one claimed. This construction is fortified by sec. 5090, which provides: "The clerk of

the court, on application of the grand jury, shall issue subpœnas in such cases for any witnesses the jury may require to give evidence before them, and such witnesses being subpœnaed and failing to attend, will be liable and may be proceeded against as other defaulting witnesses." This section refers directly to see. 5089, under which it is claimed Warner may be compelled to testify, and shows conclusively that the grand jury alone could order the subpœna, and if it did not no forfeiture could be had against the witness for failure to attend, and that it is the order of the grand jury which gives life to the subpœna and makes it a process of law. If the witness had failed to attend and a forfeiture had been attempted, a plea that the grand jury had not ordered the subpœna would have defeated it.

There is no such connection between the attorney-general and grand jury created by the statute, as will by any reasonable and legitimate interpretation warrant the conclusion that the former, who is not even permitted to be present with the grand jury during its deliberations (Code, sec. 5082), may, in any particular whatever, in whole or in part, exercise any power conferred by statute upon the grand jury.

It follows that Warner was not before the grand jury and court by process of law, while he did appear in obedience to what purported to be a subpœna, that subpœna was unauthorized, was a nullity, and gave the court no jurisdiction. In *Hatfield's* case, 3 Head, 233, Judge McKinney, in construing section 5089, says: "The term 'witness' must be understood

in a legal sense and as is obvious from the context, can only be applied to a person brought before the grand jury by compulsion to testify against others." In this case that compulsion did not exist because as already stated, the subpœna was not issued by authority of law, as is evident from the entire chapter of the statute from section 5087 to and including section 5092. Under them the power and authority to order the subpœna is vested exclusively in the grand jury—issued upon any other authority is a nullity.

In *Poteete* v. *The State*, it is held, Judge Freeman delivering the opinion, that an officer armed with a capias sufficient upon its face, must at his peril, take notice of the authority by which it was issued, and if unlawfully issued he cannot justify under it: 9 Baxt., 261.

If as Judge McKinney says, and as all must agree, the term "witness" must be understood in a legal sense, and can only be applied to one brought before the grand jury by compulsion, a fatal objection to this proceeding is that the witness was not sworn to testify. It is for the failure to testify that he may be committed for contempt if at all, and he could not testify at all until sworn—until sworn to speak the truth, etc., he was not a witness in any sense subjecting him to punishment for contempt for refusing to answer questions, as one of the essential elements of compulsion. The oath, and the only one the law regards as binding the conscience of a witness, was absent. If Warner had spoken in reply to the questions, never so falsely, he would not have been guilty

of perjury or other offense punishable by law. It necessarily follows that if Warner had answered questions criminating himself and others, he would have done so voluntarily and not as one under compulpulsion to attend and testify, and if indicted for the offense, as to which he had furnished evidence against others, he could not have successfully pleaded a statutory pardon in bar of the prosecution against him.

Without having been lawfully summoned and sworn he might have refused to testify in any case, civil or criminal, and the court would have been powerless to compel or punish.

The State is complaining of the obstinacy of the witness, and asking his punishment, therefore must make out a case. The record fails to show the witness was either legally summoned or sworn. We cannot supply the defect by intendment; nothing is presumed against one accused of violation of the criminal law. The State must show affirmatively every fact necessary to the commission of the offense.

In the next place, was he compellable to answer even though he had been properly summoned and sworn?

We have seen that he was president of a club whose rooms were over his saloon, and as we infer, his property. If we admit that the instructions given to him by the court were correct as far as they went, that is, that he would not be liable to a prosecution for any game in which he might have taken part if he would testify, was it correct as applied to the reason for refusal given by the witness? As we have seen, Warner said he was president of the Gayoso

Club, and that he did not desire to speak of any thing pertaining to the club, that his answer might criminate himself. Of what he might criminate himself, he does not say. The reason may imply that the offense of which he might criminate himself is more serious than simple gaming. "He does not desire to speak of anything pertaining to the club, that his answer might criminate himself." Clearly the meaning intended to be conveyed was, that the testimony sought from him would, if given, involve the club of which he was the president—the chief; that if he spoke of gaming in the rooms of the club there might be developments that would involve him and the club, or him as chief of the club in prosecution for other offenses to which the fact he was called on to prove might lead. The interest indicated by his reason manifests more concern for the club than for himself. What offenses he was seeking to avoid exposing we cannot know. What the club engaged in, what sort of house it kept, whether a gambling den or other establishment violative of law, good order and morals, we can only speculate. Certain it is, however, he was not influenced to his refusal to answer by the sole dread of the consequences of a confession to participation in a game for money, his apprehension was of the consequences to himself on account of the character, conduct and purposes of the establishment over his saloon, of which he was principal, and he thought, perhaps, that to tell of gaming, and participation therein, would lead to a discovery that would result in his punishment.

If these things were so, as we must infer from the reason given, the exposure of persons engaged in gaming there would have been a crimination of himself. The language of our Constitution is: "And shall not be compelled to give evidence against himself." Whether the evidence demanded of the witness against himself is to apply to a case already existing, or may be used in one that may thereafter arise, it is nevertheless under the ban of the Constitutional interdiction. That it may simply point out in one case how a prosecution and conviction may be had for another and different offense, does not avoid the organic provision, and the witness cannot be compelled to testify. If the witness shall criminate himself he can only protect himself by showing that he was examined before the grand jury as to the particular offense charged against him in the indictment: *Owens* v. *State*, 2 Head, 455–7. It follows that if his testimony develop other offenses than the one inquired of by the grand jury he will not be protected.

So far the case of *Hirsh* v. *The State*, 8 Baxt., 89, is not authority in the present. In that case there was no irregularity. I think the holding in that case is not sustainable upon reason or authority.

Section 5089 of Code provides: "And no witness shall be indicted for any offense in relation to which he has testified before the grand jury."

If, as said in *Hirsch's* case, "This enactment was intended expressly to obviate the constitutional inhibition against compelling a witness to criminate him-

self," it was not intended to obviate the constitutional inhibition against compelling a witness to give evidence against himself. Nor do I think it can be maintained that the makers of the Constitution intended the words "give evidence" to mean criminate in its strictly legal sense, they intended to and did use a term of more force and comprehension. Being assembled to make an organic law that body certainly had before them Constitutions of other governments as guides. Certainly the Constitution of the United States, with which that of the State must be consistent, was closely consulted, and the language there is, "shall not be compelled in any criminal case to be a witness against himself." That is with a view to punish him. That this distinction was in the minds of the convention, and that there was a purpose in the difference of phraseology is sustained by the dissenting opinion in *Hirsch's* case, which was prepared by Chief Justice Nicholson, who was a member of that convention, and who as a lawyer, jurist and statesman had no superior in the State, and perhaps not in the Union. In construing the Constitution, in the making of which he was a most efficient factor, he says:

"We do not concur in the conclusion that the Legislature intended, or that they could if they had so intended, to deprive the witness of his constitutional right to refuse to give evidence as to his own criminality." "The act of testifying constitutes the abrogation of the offense under the law. This only occurs after the witness has voluntarily waived his

constitutional right to refuse to testify. If he does not voluntarily waive his right he cannot be deprived of it by compulsory law." Mr. Nicholson certainly understood the language he approved, and properly defined it when he came to pass upon it as judge.

The purpose of the act is to offer inducements to persons who have committed offenses against law in connexion with others to divulge the secret. There is nothing compulsory in the language, nor could there be without a violation of the Constitution. It recognizes by its terms a want of authority in the Legislature to command the witness to testify, and merely offers a reward to him if he has or will do so. The witness may elect to take advantage of the law, or take chances of a discovery and conviction of himself. By it the Legislature proposes to buy the evidence of one guilty man against another or others, and to pay for it by exemption from indictment for the offense in relation to which he has testified. In this case the court has undertaken to compel the witness to give evidence against himself. The Constitution says this shall not be done. The court claims the authority under section 5089. Both the Legislature and the courts are creatures of the Constitution, and must conform their actions to its provisions. The Legislature could not say the witness shall testify, but could and did say, if he will, etc., and the courts can do no more. The witness must determine for himself whether he will accept the legislative reward offered for his testimony. Whether the constitutional protection thrown around offenders is

good or bad policy, is a question with which courts and legislatures have no concern. They must support and enforce the Constitution as they find it. Being its creatures they must obey its mandates, and not evade them by strained construction for any emergency, however important to public weal it may seem.

The language of both the Constitution and the statute is plain, simple and unambiguous. The one is positive in prohibiting compulsion, the other simple in its offer of inducement and reward to an offender to betray his fellows by voluntary election to testify for the sake of protection to himself.

At common law the rule is, that if an associate in crime will reveal upon his fellows and testify against parties to the same crime, he may reasonably hope the State will in consideration pardon his offense. It was a part of the rule that the government was not bound to apply it. The object of the hope held out by that rule was to increase the means of discovery and punishing offenses.

Our law-makers recognizing the utility of the rule, but seeing that it did not accomplish to any great extent the ends aimed at, modified it by converting a bare hope into an absolute assurance, making it a positive mandate instead of a discretion resting in the breasts of courts and attorneys-general. So that our statute is nothing more than the common-law rule made certain of application.

Under the common-law rule the offered witness could not be compelled to testify; then why should a different practice obtain under the same rule de-

clared by statute in more direct and trustworthy terms under a Constitution protecting a witness from giving evidence against himself, while the common-law rule is untrammeled by Constitution except as it comes of usage and precedent?

In State against Hartfield, Judge McKinney, with the statute before him for construction, says "*such person* (meaning a person before the grand jury by compulsion) cannot be *compelled* to criminate himself, but as an *inducement* to a full and unrestrained disclosure in regard to others without peril to himself it was deemed politic, *in the event of doing so*, to exempt him from prosecution."

There can be no doubt as to the meaning of this language, it is susceptible of but one construction, which is, that *compulsion* was not intended, and that *inducement* was the sole object of the legislation.

Section 9, Article 1, upon the last clause of which the question arises, is as follows: "That in all criminal prosecutions the accused hath a right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witness face to face, to have compulsory process for obtaining witnesses in his favor, and in prosecution by indictment or presentment, a speedy public trial by an impartial jury of the county in which the crime shall have been committed, and shall not be compelled to give evidence against himself."

The character of the question propounded to Warner distinctly notified him that he was accused of the

offense. It located the offense in his property, in the club of which he was president, and of which he was of course a constituent part.

That club was aimed at by the interrogatory. An attempt to involve the club must of course involve each and every member; it takes each and every member to make the one organization, an association. To strike at the club is to strike at its several component parts, and especially at its officers and agents, who are presumed to supervise and direct its proceedings.

The attempt to procure indictments or presentments is the initiation of a criminal prosecution, and no trial can be had until this initiatory step has been completed. Before the grand jury all "criminal prosecutions" must commence, and as soon as a question is asked, the prosecution is on foot. The constitutional declaration that the accused shall not be compelled to give evidence against himself applies in all stages of the prosecution from the very first step to the last. That declaration has no qualification or condition. It is positive and absolutely prohibitory. It contains no word from which it can be inferred that the Legislature or the courts can on account of promises, pledges or enactments compel a person to give evidence against himself. There is nothing from which it can be inferred that because the party may be exonerated from punishment that he may be compelled to give evidence against himself. The fact that he is not to be punished does not remove the fact that he has given evidence against himself. It is the

giving evidence against himself under compulsion that is forbidden..

When the witness has determined to report upon his fellows, and has done so, implicating himself as fully as he does his companions, can it be said that because his betrayal of his associates saves him from punishment that he has not given evidence against himself? such an assertion is a contradiction in terms. The giving evidence against himself is the consideration he pays for the reward of not being prosecuted and punished for the offense in relation to which he has given evidence against himself and others.

If prosecuted, his plea is, that while he is guilty, he has given evidence against himself; and the law says to him, "yes, you are guilty, your guilt is known, and you are not undeserving of punishment, but you gave evidence against yourself that you might entrap others, and therefore you shall not be punished." At every step we are met with the fact that the witness gave evidence against himself, that he criminated himself, and without it he has not entitled himself to the benefit of the pardoning statute; all of which may be done voluntarily, but not by compulsion. The sole foundation for the assumption that the witness may be compelled to answer is, that he is by his answer exempted from punishment, while the Constitution has no reference either directly or by implication to the punishment.

This seems to me to be rather loose construction. It would be better to read the Constitution as we find it, and if it is defective, leave to sovereignty

where the power belongs to change, alter or amend. Especially should this be so in a question that has been pronounced upon by such minds as McKinney and Nicholson, authors of the Constitution, contrary to the construction now insisted for.

Judge McKinney was in the Convention that framed the Constitution of 1834, which contains in its exact words, and by number of article and section the clause now before us. In 1859 he wrote his opinion in *Hatfield's* case, construing the statute now being considered, and used the language already attributed to him in reference to the Constitution made by himself. That opinion was the undisputed law of the land at the time of adoption of the Constitution of 1870, and Article XI., sec. 1, of the latter instrument is as follows:

"All laws and ordinances now in force and in use in this State not inconsistent with this Constitution, shall continue in force and use until they shall expire, or be altered or repealed by the Legislature." The present law was in force and use and not inconsistent with the Constitution, nor has it expired, been altered or repealed.

In all questions involving the meaning of statutes and the intention of the Legislature, it is the duty of courts to construe and define that meaning, and when that is done the statute as construed is the law of the State. So that when the ordinance just cited was adopted, it made this statute, as construed by the court, the law, to be understood in the light of the decision. The Convention is presumed to have

known the law as construed, and to have so adopted it, and to have framed the Article in question expressly with a view to the construction already given by the courts, when it transferred the language of the Constitution of 1834 to the Constitution of 1870, it as fully transferred the defined force and meaning of that language, and intended to do so.

In the consultation room two questions are raised which were not suggested on the hearing: First, that there is no bill of exceptions; and second, there is no right of appeal in contempt cases.

The first is predicated upon a recital upon the transcript, which is evidently the officious act of the clerk, made for convenience, and no part of the record as made by the court. That recital has its place in the transcript immediately after the order remanding the defendant to jail, and is as follows:

"The above and foregoing is of record on the minutes of the court, and the following is what the judge signed as accruing on the motion to vacate the judgment."

After the recital the record is as follows:

"In the matter of B. R. G. Warner on contempt. This day came into court B. R. G. Warner, and by his counsel moved the court to set aside the order or judgment in contempt entered up by the court against him March 12, 1884, and on the motion the subpœna under which the said Warner appeared before the grand jury was presented, which is as follows," (setting it out with its endorsements). Following these in regular order is the evidence already

cited in this opinion, and concluding: "The court refused to vacate the said order or judgments in contempt, to which action of the court in so refusing to vacate the said order or judgment of the court, the said B. R. G. Warner excepted, and still doth except. The above is what occurred on the motion to vacate the judgment. This March 14, 1884. James M. Greer, [seal], Judge of the Criminal Court of Shelby County."

Following this is an order reciting a prayer for appeal from the judgment, and also from the action of the court refusing to set the same aside, concluding, "To which action of the court the said B. R. G. Warner excepted, all of which appears of record. James M. Green, Judge, etc. This March 14, 1884."

I am unable to see wherein this is lacking in being a bill of exceptions. The truth of the case is fairly stated, is signed by the judge, and is recited to appear of record.

Sec. 2968 of Code is: "The truth of the case being fairly stated in the bill of exceptions, the judge shall sign the same, which thereupon becomes part of the cause."

Is the truth of the case fairly stated? His Honor, the trial judge says so over his official signature and seal. His signature without the seal made the bill of exceptions a part of the record. The statute makes no allusion to the minutes of the court as kept upon its books.

The statute was construed by this court in *Grubbs v. Greer*, 5 Cold., 162. The court says: "It is in-

sisted for the defendant, it not appearing on the minutes of the court, the bill of exceptions *was signed and sealed and made a part of the decree it does not become a part thereof.* We do not think so. By the provisions of section 2968 of the Code *it is made "a part of the record."* "The truth of the case being fairly stated," etc. This section is conclusive of the question: *"It is the usual formula to enter upon the minutes the action of the court, but it is not necessary to do so to make the bill of exceptions a part of the record."*

This holding was re-affirmed in *McGavock* v. *Puryear*, 6 Cold., 39, the court saying "It is not necessary under the rulings of this court in the case of Grubbs against Greer, that the minutes of the court should show the bill of exceptions was signed, sealed and made part of the record."

In *Ferrill* v. *Alden*, 2 Swan, 79, the court says: "A bill of exceptions is for matter excepted to at the trial and ascertained before the verdict," etc., is sufficient *if the exception* be taken at the trial and noticed by the court, and it may during the term be reduced to form, and signed by the judge.

So that it is clear beyond doubt that a truthful statement of the case and exception to the action of the court, signed by the judge, constitute a complete and perfect bill of exceptions, and such is this record in every particular to the smallest detail.

It is next objected in the consultation room, and not by counsel on either side, that there is no right of appeal, and several cases are cited in support of

the position, one of them, *Burks* v. *Fleming*, 6 Baxt., 333, gave the right of appeal, and held, "The principles of the organic law of the State, as well as of the long established practice of the courts require a very liberal construction of the right of appeal to those whose liberties and property are *in any manner endangered. It is by such right that petty tyrannies can be kept down in republics.*"

I now ask, did this court ever at any time since the decisions were made, regard *Martin's* case, 5 Yer., 456, or *Galloway's* case, 5 Cold., 335, or the copied illustrations from the two cases in *Fleming's* case, 6 Baxt., 381, as conclusive of the question of the right of appeal? I undertake to answer positively, no.

The reasoning in the older cases is an argument of inconvenience, an element not admissible of consideration on the trial of a question involving the liberty of a citizen.

In *Hirsch's* case, 8 Baxt., 92, the court says: "It is insisted by the attorney-general that the contempt being committed in the presence of the court, the defendant had no right of appeal from the judgment. How this may be we do not undertake now to decide as the main question is decisive of the case." If this language means any thing, it is that the cases already cited did not settle the question, and that it was an open one. If a majority of the court had have been of opinion that the question of right of appeal had been settled, it was wholly unnecessary to go into the merits of the case. From some cause, regardless of *Martin's* and *Galloway's* cases, and the quota-

tions in *Fleming's* case, the question of the right of appeal was not decided. The court would "not undertake to decide it." If it had been decided, and the court felt it was bound by the decision no undertaking to decide, nor the reason given for the refusal to so undertake was called for.

It would seem, in view of the cases referred to, that a declaration on the part of the court of the kind made, was an admission that the decisions were not only not satisfactory, but were not sound, and that a majority at least thought the right of appeal did exist.

In *Hundhausen* v. *Marine Fire Insurance Co.*, 5 Heis., 702, a contempt case, this court speaking through Judge Freeman, said: "The action of the chancellor in a case of contempt, such as is before us in this record, is subject to be reviewed, and that writs of error and *supersedeas* were applicable and appropriate as the remedy of the party, *and the motion to discharge the supersedeas will be discharged.*"

Judge Freeman also says in that case: "This court is the supreme tribunal of the State, and other courts inferior in the sense of being subject in their action to the jurisdictional control of this court, as the appellate tribunal *over all such judgments and decrees* as they may render affecting the life, *liberty*, property or *rights* of the citizen of the State. The Judge adds: "The particular mode in which this jurisdiction may be exercised, whether by appeal in the nature of a writ of error, or by writ of error and *supersedeas*, is a matter of regulation by the Legislature, and such restrictions and regulations may

be enacted by the Legislature as may be deemed proper *so as not to defeat the ultimate control of this court as the Supreme Court of the State over the inferior courts ordained by the Legislature.*"

In *Harwell* v. *The State*, 10 Lea, 544, Chief Justice Deaderick delivering the opinion of the court in a matter of contempt said: "The grand jury is a constitutional part of the court, and any illegal or corrupt interference with them in the discharge of their duties, or attempt by outside influence to control their action would be a contempt of court for which the offender should be punished. But we hardly think the facts disclosed in the evidence are of the character indicated. The judgment of fine and imprisonment was reversed.

In *Page* v. *The State*, 11 Lea, 202, in an opinion delivered at this place one year ago, Judge Cooper, speaking for the court, said: "The statute making it a criminal offense to retail spirituous liquors on Sunday is intended to punish the seller, not the buyer, and the latter may therefore be compelled to testify as a witness on the trial of the indictment against the seller, and may be punished for contempt in refusing to testify." The judgment of fine and imprisonment was affirmed. The opinion concludes: "No point is made as to the right of the appellant to appeal from the judgment." No point is made as to the right in this case. If, because the point was not made in the one case it assumed jurisdiction of its merits, why decline in the other with precisely the same surroundings. If, in

Hirsch's case, the point was made, why should the court give it the go-by, and decide the matter upon its merits? Why should it assume to raise the question here of its own motion? Then we have five cases distinctly recognizing the right of appeal, all since the cases of *Martin* and *Galloway*, and directly in their faces. For a period of thirteen years the right of appeal has been recognized and practiced upon by this court. The profession recognizes the change of the rule. The change is consistent with our institutions. If we ignore what we have done, and the practice we have so often adopted, and go back to what is claimed to be the old rule, how will the profession ever know a rule to be settled even for the conduct of the members of the bench who have announced it? Do we write to confuse?

If the right of appeal was settled not to exist, the court had no jurisdiction to try the cases cited. It was the duty of the court to have stricken them from the dockets whatever may have been their facts, and not to have trespassed upon the exclusive jurisdiction of inferior courts by affirming and reversing on the merits as we understood them.

For one I do not believe any power exists in the courts or Legislature to restrain any citizen from being heard by all the constitutional courts of the State in *any and all matters* involving life, liberty or property. The right of appeal in some form exists in every case, whatever the form of proceedings, and continues till passed upon by the court of last resort, the Supreme Court.

It seems to me the reasoning in the case holding that this court may not review contempt cases is not well supported. It is said that "if a writ of error did lie from a judgment of contempt, courts of justice as such could not exist to any useful purpose in times of excitement and turbulence, because they could not protect themselves, etc. That a witness who refused to give his evidence, in contempt of the court, and was to be imprisoned, might pray the writ, and it would be impossible to coerce him," and yet these cases hold that if he is improperly imprisoned, the writ of *habeas corpus* will furnish relief. Now the writ of *habeas corpus* may be issued by the *fiat* of a different judge to the one who committed for contempt, and he may try the right to the writ. By the service of the writ the contumacious witness is taken out of the control (for the time being at least) of the committing judge. The judge trying the right hears the facts of the case, and may discharge the witness entirely, or he may remand him to prison, If the proceedings in the court of the one judge may be thus interfered with by the judge of another, and the action of the latter judge make it impossible for the former to coerce a witness, by what process of reasoning can it be held that the same results may not be reached by writs of *supersedeas* from this court.

The case is tried upon the same facts. The action upon the writ of *habeas corpus* is final if there is an order of discharge. The writ of *supersedeas* is only the means of bringing the matter to the attention of this court. The *fiat* decides no question and cannot

defeat the punishment for contempt, for if the facts satisfy this court that the order of imprisonment was proper, it will be affirmed and enforced. In the *habeas corpus* proceeding we have the opinion of a single judge, in the *supersedeas* proceeding we have the opinions of all the judges of the court of last resort as an authoritative settlement of the questions made.

In the one case one judge may be of one opinion and another of a different one, and the rules of law and practice may be and are different in the several circuits. Neither is authority to the others, while the decisions of a court of last resort control throughout the State. If a case falling under the illustration put in the old cases should arise (as is not at all probable if even possible), no judge of this court would grant the writs of error and *supersedeas*. It is always in the power of the committing court to force the offending party to resort to the *supersedeas*, and it would be his duty to do so in cases as extreme as the illustrations of the older cases, or even when he was of opinion the contempt was in the least outrageous in its character.

In *Hundhausen* v. *Marine and Fire Insurance Company*, Judge Freeman intimates pretty clearly, that writs of error and *supersedeas* are the remedy in cases of contempt: 5 Heis., 712.

If the argument "*ab inconvenienti*" is to obtain for any purpose, why not extend it and say that it would be dangerous to permit the arbitrary power of imprisonment to vest in the bosom of a judge in times of excitement and turbulence, because he might then un-

lawfully and oppressively imprison a witness for refusing to answer an illegal and impertinent question pro pounded for the advancement of partisan purposes? The integrity of the citizen may be as safely trusted as the integrity of the judge. Both owe the same allegiance to law which they are presumed to know.

Judge Smith says in *Galloway's* case, 5 Cold., 336: "If the judgment for the contempt be for cause for which the court has not jurisdiction, and it so appears upon the record, the judgment is void and no justification for the imprisonment. It stands on the law of universal application to the judgment of courts, that if the court has no jurisdiction, the judgment is void." I ask who is to decide whether the judgment be void? Is it to be done by a judge of co-ordinate jurisdiction, or by a court of appellate jurisdiction? Is one circuit judge, one chancellor, or one judge of a criminal court to review and affirm or reverse others with the same jurisdiction, or must it be done by a court of appellate jurisdiction? If a judgment is void it can only be vacated by the court rendering it or by a court of appellate jurisdiction. The validity of the judgment here depends upon the construction of the statute, which this court alone can authoritatively construe. It is a strange holding, in a cause originating in the criminal court, the judge of that court giving one construction to a statute and the circuit judge a different one, or *vice versa*, that the opinion of the latter is conclusive, not only upon the former, but also upon the Supreme Court. Yet such is the inevitable logic of the theory that *habeas corpus* is the only remedy

in contempt cases, and no appeal lies. I cannot subscribe or assent to any such restrictive construction of the constitutional guarantee. "*That all courts shall be open*, and every man for any injury done him in his lands, goods, *person* or *reputation*, shall have remedy by due course of construction of law, and right and justice administered without sale, *denial* or delay": Const., Art. 1, sec. 17.

I am unable to comprehend the soundness of that judicial reasoning or the authority for its holding, by which the doors of this constitutional court of last resort—and most important of *all courts*—are closed and barred against him who claims in any lawful proceeding to have been injured in *person* or *reputation*. This is the "*denial*" which is condemned and positively prohibited by the instrument that created this court, and to which this court swears support and allegiance. Let him, who can, explain on reason sounder than that of inconvenience—a reason unknown to the Constitution, and one that cannot be extracted from it, however much it may be tortured by construction. A reason that as well applies to all criminal proceedings as to contempt and *habeas corpus* cases.

Chief Justice Deaderick and Judge Cooke concur in the opinion that the subpœna was unlawfully issued and gave no jurisdiction. That the bill of exceptions is perfect, and that the writs were properly granted.

The *supersedeas* is made perpetual and the petitioner discharged.

DEADERICK, C. J., delivered the following opinion:

In the criminal court of Shelby county the plaintiff in error was imprisoned for alleged contempt of court, in refusing to answer questions, proper in themselves, propounded to him by the foreman of the grand jury in the room of said jury, and in their presence, touching his knowledge of unlawful gaming. He had been summoned, by service of subpœna, to appear before the judge to testify on a day named.

The record discloses that the foreman of the grand jury with the witness appeared in open court, and informed his Honor that the witness had refused to answer whether he knew of any unlawful gaming for money in the Gayoso Club rooms over his saloon, and similar questions as to gaming, within the last six months.

The defendant persisting in his refusal the court ordered him to jail for contempt, there to remain until he should purge himself of the contempt, or be otherwise delivered in due course of law. From this judgment defendant prayed an appeal, which was refused, and he was committed to jail. He presented a transcript of the record of the proceedings of said criminal court to one of the judges of this court, and prayed for writs of error, *certiorari* and *supersedeas*, which were granted, and the case is now before us for final disposition upon the questions as to whether we have any jurisdiction to revise the judgment, and if so it is erroneous.

The record consists of a transcript from the min-

utes of the court, and the certificate of the judge of what transpired on the trial of the cause, officially signed by him during the term of the court. We think this was intended for, and is in every essential particular, a bill of exceptions, and is a part of the record in the cause. From this record it appears that the subpœna to testify was issued upon the order and at the instance of the attorney-general, and that the grand jury did not order or direct the issuance of any subpœna requiring the witness to appear and testify before them. This power the grand jury have in certain cases specified, gaming being one of them: Code, secs. 5087, 5787*a*. But this power being in derogation of the common-law cannot be extended beyond the express provisions of the statute: 4 Cold., 195; 1 Swan, 19; Meigs, 99.

The attorney-general has no power to direct witnesses in such cases to be sent before the grand jury, nor has the court, but the "grand jury shall have the right and power" to send for witnesses under said sections, and they only.

Our statutes define what shall constitute contempts of court, and directs that the offense shall not be construed as extending to any other acts than those specified.

The third specification is "the willful disobedience or resistance of any officer of said courts, party, juror, witness or any other person, to any *lawful* writ, process, order, rule, decree or command of said courts."

It is under this sub-section 3, if at all, that the validity of the proceedings and judgment of the in-

ferior court can be maintained. But in my opinion the judgment cannot be upheld and maintained under this sub-section, upon the ground that the judge had no *lawful authority* to order defendant to do the act, for his refusal to do which, the punishment was imposed. To constitute the offense there must be willful disobedience of a *lawful order* of the court. The judge had no lawful power to compel another, although in his court room and presence, to go into the grand jury room and testify as to his knowledge of unlawful gaming. This power resides in the grand jury only, and then by subpœna issued by their order. So that to make disobedience of an order of court contempt, the order must be one which the court has the power to make, it must, in the language of the statute, be a "lawful order."

In this case we think the court below had no power under the facts disclosed to imprison the defendant, and that the writs of *certiorari* and of error were properly used to secure the revision by this court of a judgment which the said court had no jurisdiction or right to render.

For these reasons I concur in the conclusion announced by Judge Turney, that defendant should be discharged.

COOKE, Sp. J., concurs in the foregoing opinion.

FREEMAN, J., delivered the following dissenting opinion:

This case brings before this court certain proceedings in a matter of contempt had in the criminal

court of Shelby county, Judge James M. Greer, presiding.

I find two records before us, and a proceeding on *habeas corpus* before Judge Pierce of the circuit court of Shelby county, in which he refused to discharge defendant, Warner, from imprisonment under the judgment of Judge Greer. This is brought before us, under a *certiorari* issued under a *fiat* of one of the judges of this court.

We take it to be too well settled that the action of a judge or court on a writ of *habeas corpus* cannot be reviewed by this court under any form of procedure, to demand any discussion or investigation: *State ex rel.*, etc., v. *Malone et al.*, 3 Sneed, 416–17; *State* v. *Galloway & Rhea*, 5 Cold., 335, *et seq.* This record need not be further noticed.

The case is this, as shown by the record: On March 12, 1884, the minutes of the court show that C. B. Bryan, foreman of the grand jury, then in session, "came into open court, accompanied by B. R. G. Warner, and also the attorney-general. Whereupon the foreman stated to the court that said Warner had been examined before the grand jury as a witness, and had refused to answer the following questions, to-wit: "As to whether said witness knew of any unlawful gaming for money in the Gayoso Club Rooms over his saloon; that the witness had refused to answer this and other questions of a similar character touching his knowledge of unlawful gaming in the last six months. The foreman stated that he had informed witness that he would be required to answer said questions, or the

foreman would be compelled to bring him before the court. The witness still refused to answer, and he had him before the court. Whereupon the court inquired of the witness, upon what ground he based his refusal. Witness replied that he was president of said Gayoso Club; that there was some sixty members of said club, and he did not desire to speak of any thing pertaining to the club. He also said that his answer *might* criminate himself, and therefore he had refused to answer. Whereupon the court instructed the witness that a person was not liable to prosecution for any information given before the grand jury touching any misdemeanor in which he might have taken part, hence he could not criminate himself even if he had answered that he had been engaged in said gaming, and that he could not be prosecuted. Whereupon the witness said he still felt compelled to refuse.

The court then informed him that it would be the duty of the court to commit him to jail for contempt until he would answer; that he hoped the witness would think better of his refusal, and not impose upon the court this disagreeable duty. Witness replied he would still refuse. Whereupon the court adjudged that said B. R. G. Warner be held in contempt of this court, and committed to the body of the county jail of Shelby county until he shall have purged himself of said contempt by answering said questions, or else delivered therefrom by due process of law. That he pay the costs of this proceeding, and execution issue for the same. Thus the proceeding ended by a final judgment.

On the next day the defendant in person and by attorney—the attorney-general being present—moved the court to vacate the judgment heretofore entered on the minutes of this court, holding the defendant in contempt, and committing him to jail, which motion was overruled by the court.

Whereupon the defendant prays an appeal in the nature of a writ of error to the next term of the Supreme Court, which said appeal is refused, and the defendant was remanded to jail in accordance with the judgment heretofore rendered.

It was settled by this court in the case of *Hirsch* v. *The State*, 8 Bax., 89, after much discussion of the question, that a witness summoned before the grand jury under subpœna could not refuse to give evidence as to violations of our laws against gaming, on the ground that he might criminate himself. Section 5089 was held to exempt the witness in such cases.

We have no doubt of the correctness of this case, and do not deem it necessary to re-examine that question. The answer, however, to the argument of the majority opinion is not by the simple fact that he cannot affect himself legally, when the State has said he shall not be prosecuted in such a case. This meets the whole point in it, unless we hold that whether it can legally affect himself or not, he is still protected. In fact, as I understand it, this is the theory of the opinion. If so, I venture to say that the conclusion is not sustained by any authority to be found in our law—whether text-book or decision.

Up to this point there can be no question the

judgment of the criminal court is correct. The witness had persistently refused to answer the questions which had been put to him. They were proper questions in investigating the fact whether gaming in violation of law had occurred within the knowledge of the witness. The court had acted most considerately to the witness, and explained to him that he could not involve himself by his answer, and even urged him to reconsider his refusal. He still persisted in his refusal. This, in connection with the reasons given by the witness for his refusal, admits of but one conclusion, that is, that the witness had determined not to inform on his friends, the members of his club; for the only reasons given for refusal were that he was president of the club, and did not wish to speak of any thing pertaining to the club, and also that his answer might criminate himself. This last objection was removed by the explanation given by the court, and that this was not a controlling reason for his refusal is seen by the fact that no doubt is expressed by the witness as to the correctness of the explanation of the law as given by his Honor on this point. That no sufficient or even plausible, legal justification for the witness' refusal to answer the questions propounded before the rendition of his Honor's judgment, the statement we have given makes certain. Upon the case as it stood before his Honor when the judgment was rendered, we have only a contumacious witness, who, on an assumed point of honor, had determined to brave the court, defy its authority, and take the consequences, thus putting himself in the

way as an obstruction to the enforcement of the criminal law of the land. It will be seen that afterwards the effect of counsel was to shield him from the consequences, and give him a triumph over the court by matter presented *ex post facto*, which had never been thought of in the inception of the case, nor until after a final judgment had been rendered.

On this statement of the case it clearly appears this is not a case that appeals to this court for any liberality of construction in order to shield the defendant, or to favor the application of mere technicalities, that he may elude the grasp of the law. We should be slow to find mere technical error that would give this defendant immunity and an apparent triumph over a court acting under an evident sense of duty to enforce the law of the land, and maintain the dignity of the judiciary.

It appears from a statement signed by the judge, and "filed," as the record says, "by the defendant," but not ordered to be so filed, or made part of the record in this case by the court; that on this motion to vacate the judgment already entered on the 13th of March, the motion being on 14th, the subpœna under which Warner had been summoned to appear and testify before the grand jury was read. This commanded the sheriff to summon him to appear before the criminal court, then in session, "then and there to be sworn, to testify and give evidence before the grand jury sitting, in behalf of the State concerning his knowledge relative to a bill of indictment to be preferred against divers persons for the offense

of gaming committed within the county of Shelby." The subpœna is endorsed on back of it: "State of Tennessee *v.* General Information. Grand jury subpœna. Issued March 14, 1884, and executed same day by the sheriff's deputy."

It is then stated that it was admitted by the attorney-general that the subpœna was issued by his instructions and not at the instance of the grand jury, and said Warner was not sent before the grand jury on any indictment against any individual. It is further said, that the members of the grand jury, as well as the attorney-general, interrogated the defendant when he appeared under the subpœna. A copy of the constitution and by-laws of the Gayoso Club is also added to the statement.

This is the entire case as it stands in the record.

Treating this statement so signed by the judge for the present as a bill of exceptions, the first question for consideration is, has this court any revisory jurisdiction over the case. If not, then the contest would properly end at this point, and we need not discuss or decide the other questions that may be raised on the facts stated.

The case presented by the facts before the court, and on which his original judgment was rendered, make a case of contempt in the presence of the court, in the face of its authority, a direct personal contest between the court and the defendant in open court. This, we take it, cannot be doubted. It is this or nothing. The question then is will an appeal, writ of error, or any other revisory proceeding lie in this court in such

a case? The judgment, it is proper to say, is valid on its face beyond question, reciting the facts clearly showing the contempt, with no recital affecting its validity in any way.

In the case of *Andrew L. Martin, ex parte*, 5 Yer., 456, it was held that "an appeal in the nature of a writ of error does not lie from the order or judgment of a court punishing a party for contempt." This case was decided in 1830, and was based, as Judge Catron says, on *Shumate's* case at Nashville in 1823 or 1824, of which case he says: "Much pains was taken with that opinion, where the authorities were cited." He adds: "It is most obvious, that if a writ of error did lie from a judgment for contempt, courts of justice, as such, could not exist to any useful purpose in times of excitement and turbulence, because they could not protect themselves from assaults that would prevent their sittings." One illustration given by the learned judge in support of the conclusion of the court, is analogous to the one now before us. "Suppose a criminal cause on trial before a jury, and a witness refused to give evidence in contempt of the court, and he was ordered to be imprisoned, to coerce him to depose on behalf of the defendant or State, he prayed an appeal or writ of error and continued at large. How would it be possible to coerce him to depose? To the same end as imprisonment may a fine be imposed by the court, not exceeding fifty dollars."

The foregoing, he concludes, are given "as instances why consistently with the existence of courts of justice, writs of error dare not be allowed to revise judg-

ments for contempt. Not that the case before the court presents the least enormity. The facts as set forth in the bill of exceptions, show very slight misbehavior by a member of the bar, still were the writ of error entertained in this case, it would equally lie in any other case, the most enormous and aggravated."

The remedy always open to the party if unlawfully imprisoned, is by *habeas corpus*, and as Judge Catron says, "no doubt relief could be afforded by this constitutional writ." The above is the language of the court.

This question came again in review in a case that created as much interest at the time, probably, as any ever occurring in our courts, *State* v. *M. C. Galloway and W. H. Rhea*, 5 Cold., 327. It was argued most zealously and with great ability by some of the ablest counsel in West Tennessee—the authorities examined thoroughly. The opinion by the late Judge Henry G. Smith, is one of marked ability, in which the precisely same result is reached as in the *Martin* case. The only modification made in the general law on the subject is, that the judgment is required by that opinion to state upon its face the cause of contempt alleged, as the ground of the jurisdiction on which the judgment is rendered, otherwise it would be invalid. This furnished the safe basis for relief at all times under a *habeas corpus*, and is as far as public policy demands, as held by these cases, as well as the general current of authority.

Again, in the case of *Brooks* v. *Fleming*, the question of contempt and revisory power of this court came

under review. This was a case of a motion to attach Fleming for violation of an injunction. The chancellor convicted in that case, and appeal was prosecuted to this court. The case of violation of an injunction, or like process, not being in the presence of the court, and to be brought, in the language of the judge delivering that opinion, "to its knowledge on the testimony of others," and upon issues made, was held to be an exception to the general rule, and the appeal allowed.

But in the opinion in that case by Judge Turney, the doctrine of Judge Catron in the case of *Martin* as to contempts in the face of the court is emphatically approved. He says: "On principle the right of appeal to the party charged is clear *when* the contempt is not in the face of the court. That it will not lie in such case is for the strong reasons instanced by Judge Catron in the case of *Andrew L. Martin ex parte*, 5 Yer., 546, as well as others, which he proceeds to give," beyond question.

I had the misfortune to differ with my brethren of the Bench on that question, but they are agreed, and I stood alone—was compelled to acquiesce, and feel bound to do so now, as a question too well settled to be disturbed or reopened. Unless we shall overrule all that has been decided, and so long approved in these decisions, this case ends here, and this court has no jurisdiction over the question.

I but add for myself, using the illustration given by Judge Catron in the 5th Yerger case, that it would scarcely be held a valid answer to a refusal by a

witness in a case on trial, when he refused to obey the order of a court to testify, that he should make the objection that he had not been regularly summoned, or even had been summoned under a subpœna that called for and authorized the summoning of another and different man, or it had been issued at the instance of a man not authorized to demand the issuance at all.

The consequences of allowing an appeal or writ of error in such cases reach too far, and are too vital, as said by Judge Catron, to the very existence of courts. Suppose the case of half-dozen roughs or gamblers, who have been guilty of violations of law, and wish to prevent a term of court being holden, in order to get the benefit of the statute of limitations. They go into the court-room, and by noise and turbulence stop the public business. The court adjudges them guilty of contempt, and they appeal, free to repeat their offense. It is seen the only protection of the court is not his power by law as a court, but in his personal ability to contest his right to hold his court.

Again, in gaming cases, the witness has but to refuse to testify, however regularly summoned. The court can but render a judgment of contempt from which he appeals, and before the appeal can be disposed of in this court six months have expired, and if he is sent back, he may answer willingly, and purge his contempt—his friends are saved, but the criminal law has been trampled in the dust. In fact such a practice would serve practically to give

parties violating the gaming laws immunity from all punishment in the future. These laws had as well be repealed as to the largest class of such offenders.

It may be said the party will be imprisoned for contempt on reversal in this court. But we take it this would not be done if he answered or gave testimony, which he could well do, as no one could be injured by it.

The case put by Judge Catron of a witness refusing to testify on a criminal or even civil trial serves also to illustrate the necessity of the rule. The court adjudges him guilty of contempt, but he appeals, defies the court, goes free till his case is heard by this court. In the meantime the case must stop, a mistrial be had at cost of the State or the parties, and the case be delayed till his appeal be heard in this court. In this way it is seen that the wheels of justice may be stopped by a recalcitrant witness whenever he chooses. Such consequences show the wisdom and necessity of the rule as held by this court from 1824 down to the present time. Nothing is seen in this case demanding its change—on the contrary, as we think, every thing that does appear demands its enforcement, and an emphasis that shall be felt, and thus close the question forever.

In all the cases cited by Judge Turney the question of right of appeal was not made or decided, or were not cases of contempt in the face of the court as this is. The case cited from 5th Heiskell, *Hundhausen* v. *Marine Insurance Co.*, opinion by myself, was a contempt for violation of an injunction out of

court—the precise case of Fleming against Brooks—in which Judge Turney emphatically distinguished between the two class of cases, giving appeal in one case, refusing it in the other. I sought in the *Brooks'* case to carry the right to cases of contempt even in the face of the court, but was overruled by my brethren, Judge Turney delivering the opinion. This view has never been overruled till now. That case is in perfect accord with my present position, while Judge Turney is inconsistent with his opinion in the Brooks' case.

But entertaining the jurisdiction of this court, and treating the statement signed by the judge as a bill of exceptions, as I do not think it is, showing that on the motion made to vacate the judgment, it did appear that the subpœna in this case was issued by instructions of the attorney-general, and not at the instance of the grand jury, and that Warner was not sent before the grand jury on any indictment against any individual, what would be the result?

This, in the first place, presents the question whether a party can in a case like this, on motion for a new trial, or it may be conceded even on the original trial, interpose the objection that the summons on which he appeared was improperly issued, or issued at the instance of a party who was not authorized to issue it, and thereby successfully sustain a refusal to answer questions put to him as a witness.

After careful reflection I conclude the defense cannot be made.

The subpœna is regularly issued by a court of com-

petent jurisdiction, is on its face complete, and for a lawful purpose, that is that the witness "may be sworn to testify and give evidence before the grand jury then in session in behalf of the State concerning his knowledge relative to indictments to be preferred against divers persons for unlawful gaming within the county." The party regularly appeared in answer to the summons, and the grand jury by their foreman adopted the subpœna as shown, and regularly propounded the proper questions to him, under their inquisitorial power in such cases. If the foreman had gone and demanded a subpœna, he would have got a precise counterpart of this one. He has the party under this one before the body, and no reason furnished by any public policy, law, or tending to aid in the administration of public justice is seen, why the form should be gone through of getting another? Suppose the foreman had applied for a subpœna for Warner, and been told by the clerk that one had already been issued, and he had said that is sufficient, and gone on to act under it, as in this case, could we so far stick in the bark in favor of technical routine, as to say the witness could refuse to answer when before the grand jury, because the attorney-general and not the foreman had applied for the subpœna? There is no difference in principle in the two cases. In the one the foreman adopts the subpœna already issued, but before the party comes before the grand jury, and the other does so afterwards, by using the witness and treating him as regularly summoned. This is shown by the fact that the foreman puts the question, and on his refusal to

answer takes him before the court, reporting his refusal. It is said, however, the grand jury alone has inquisitorial power, that is the language of section 5087. "The grand jury shall send for witnesses whenever they or any of them suspect a violation of the laws against gaming." Conceded. But that body sends through the agency of a subpœna, or summons issued by authority of the court, and when a witness is before them by such summons, and they treat him as a witness for the purpose thus authorized by law, I know of no rule of law, nor principle of sound public policy, which requires courts to go behind all this, and see if the proper person requested the subpœna to be issued originally, or that a witness may be protected in not answering a question pertinent to an inquiry that body is authorized to make.

Suppose the witness should have answered and given information of gaming, and that he had been engaged in it himself in the particular cases, would there have been practically the slightest danger that he would have been indicted on the information thus given? Assuredly not. If he had been, however, then is there any legal danger of his being injured?

He would simply have filed a plea stating the fact, that he had been summoned before the grand jury to give evidence as to gaming, and had given information in the particular case, and this had been the basis of the indictment found against him, and on proof of this he would most assuredly have been directed to be acquitted by the court, as held by Judge Greer in his exposition of the law in this case. Suppose, how-

ever, the attorney-general had replied, admitting the subpœna, but that in fact he had applied for the subpœna, and not the grand jury. Would such a replication have been held good? Might not the defendant say, I know nothing of that, the grand jury had me before them under authority of the court, and put the questions. I know by law that body had the power to inquire into and discover violations of the gaming laws, and so I did not choose to contest their authority. Would there have been any answer in fairness or justice to this defense? But the case of the *State* v. *Hatfield*, 3 Head, 231, is thought to maintain a different view. I do not think so. The whole point in the decision, and all that was ruled by the court is given correctly in the syllabus as follows: "The provision of the Code, sec. 5089, exempting a witness from prosecution for any offense in relation to which he has testified before the grand jury, does not extend to and embrace a grand juror, who communicates to his fellow-jurors his knowledge of a crime having been committed, and in doing so, voluntarily implicates himself."

In distinguishing this case from the case provided for by the section of the Code, Judge McKinney simply said: "The term 'witness' in the statute must be understood in the legal sense, and it is obvious from the context, can only be applied to a person brought before the grand jury, by compulsion, to testify against others. Neither the letter nor spirit of this particular exemption applies to the case of a *grand juror* who voluntarily criminates himself." He simply puts

the case of a witness summoned as the one protected, and the one who is not, but voluntarily gives information as not. That is all in this case. He certainly did not hold, nor would that court have done so, we take it, that if compelled in fact by a subpœna to appear, and he does so appear, and give testimony, that he would not be exempt if the State could show an irregularity in the issuance of the subpœna. On the contrary, his language fairly implies, if any thing, the contrary.

I hold, that the subpœna being on its face from proper authority, and complete as a process from such a court, the witness is bound to obey it—it is compulsory on him. The consequences of the opposite doctrine would be in every case where a witness is subpœnaed, he would be compelled, before he answered in cases that might affect himself, to go and at his peril ascertain that the process was issued at request of the proper authority. If he failed to get information correctly on this point, he would answer at his peril. He could seldom know any thing on the subject, and so before he answers must be subjected to the trouble of making the inquiry, and then take the responsibility of making a mistake. This is to impose a burden on the witness not in accord with justice or the analogies of our law. In all other cases, as an officer serving process, he has only to look at the face of the paper and see that it is not void on its face, and he may go on to obey it without fear. He is not compelled to look behind the process itself.

Why should a witness have a different rule applied

to him? Why should a contumacious witness, as in this case, who seeks to shield his friends who have violated the law, be permitted to invoke for himself a rule that should impose such burdens on others, or why should courts listen to such an appeal? I confess I see no reason consistent with law or sound policy that demands it—on the contrary, much that forbids it.

Since writing the above, I find in a note to the case of *Dougan* v. *District of Lake Co.*, Am. L. Reg., vol. 22, page 530, the decisions, both English and American, collected. The rule resulting from them is thus given by the Supreme Court of Colorado: "The power of punishing for contempt is inherent in all courts. It is absolutely necessary they should possess it, whether expressly given or not by statute, and when the court has jurisdiction of the class of cases to which the action belongs, unless a want of jurisdiction in the *particular* case affirmatively appears on the *face* of the proceeding, no error on ruling, no *irregularities* in the proceeding will divest it of its power." That the court has, through its grand jury, jurisdiction of the class of cases now under investigation is beyond doubt. This conceded, irregularities in the form of proceeding go for nothing in a proceeding for contempt.

Again, it is held the refusal of a witness to answer before the grand jury is a contempt of court of the United States, in a case before the District Court: Am. L. Reg., vol. 20, 98. And where a contempt is committed in the presence of the court, the court has

immediate jurisdiction of the person of the offender and may punish at once: *Middlebrook* v. *State*, 43 Conn., 257; 3 Clarke, Iowa R., 69.

In the face of all this uniform authority, we are unable to see any thing in this case that demands it should be disregarded, or on the first point of right of appeal—our own cases overruled—that this defendant shall escape punishment, or be enabled to shield his friends from prosecution by defying the authority of the court having jurisdiction to enquire and punish, if guilt be proven.

It is argued with great earnestness, however, that there is danger to the citizen if the attorney-general shall thus be allowed to send for witnesses. I am unable to see the imminence of this assumed danger. If the grand jury have not exercised in fact their inquisitorial power, then the parties indicted have but to plead and prove the fact, and the plea will be sustained and the indictment quashed. Is not this sufficient in such cases? Here in fact is where the error, if any, may fairly be urged as a defense, and be legitimately heard, but not by the witness in support of his refusal to answer.

It is not improper to say here, that the writer of this opinion has never been able to sympathize with the very common prejudice against the inquisitorial power of grand juries. It is the body under our law for the purpose of ascertaining violations of law, and bringing men to punishment who have been guilty. As said to me lately by an experienced circuit judge, he had seldom known a man indicted by a grand jury

who was not in fact guilty. Every offense must first be reported upon by this body before the party can be tried. On what principle there should be trammels placed upon the free action of such a body in obtaining witnesses by whom violations of law can be shown and brought to punishment, I have never been able to see. I would give them this power in all cases where they had reason to suspect crime, and fix upon this body the *duty* to investigate. The opposite view must rest on the idea that for some cause it is important in many cases that crime shall have as much shelter as possible, and only be punished when private vengeance shall prompt a prosecutor to undertake to represent public justice, and the few other cases provided for by our law. In a government organized on the theory that law is to be supreme, and give protection to the community; and this protection given by enforcement of its penalties, it seems to me all the agencies of that law should be given all power that will increase their capacity to attain the end for which such agencies exist. To inquire through sworn witnesses is an agency efficient for this purpose, and the Legislature have seen this, and applied it in cases that otherwise had grown difficult of detection, as gaming for instance. Why not in all cases where law is violated. I confess I am unable to see a reason for a contrary view.

But the radical error that underlies all this question is, that it is assumed the citizen is to be protected in this case from unauthorized prosecutions, as I have shown he has ample protection, if in fact the grand

jury exercise unauthorized power. The question is not whether the citizen shall be indicted improperly under the inquisitorial power of the grand jury, but whether a witness shall be permitted to defy the authority of the court, and refuse to answer questions propounded, on the plea that the subpœna under which he was summoned was not regularly issued, the process being regular on its face, representing the authority of the court, and to him a complete protection for his action under it. In a word, the question is whether the witness shall be permitted to shield his friends from criminal prosecution by interposing as an after thought a mere technicality as to the regularity of the summons by which he was commanded to appear. I hold that the subpœna had served its purpose when he was brought before the grand jury in obedience to it, and had been sworn. The only question is, was that body in the exercise of its proper authority? Had it the right to inquire of violations of the gaming laws? If so, the party was bound to answer, and it was no matter of concern to him whether the subpœna commanding him to appear was irregularly issued or not. He had passed the point where such an objection could be made, and by being sworn had submitted himself to the jurisdiction, and was bound to obey the orders of the court as a witness.

This is common sense, and the practical view of the question—can do no one any wrong who is innocent, and the guilty deserve to be punished—the opposite view shields the offender from discovery, gives protection and immunity to crime, and lowers the dig-

nity of the judiciary. So that it can be defied by any one who chooses, and escape punishment on a mere technicality, as I think, and unsustained either on principle or a sound public policy.

The result of holding that an appeal will lie in such a case practically renders the inquisitorial power of the grand jury in gaming cases entirely powerless. A witness has only to refuse to answer the questions, and appeal to this court. His friends who are involved will generally pay the expenses of the appeal. By the time the case is decided here in the larger proportion of cases, the statute of limitations will have run, and the violators of law be free from danger, and so escape—criminals will be shielded, but the courts go down in the dust under this ruling. I add, the only true principle on the question of the right of the witness to object to the regularity of the subpœna is, that when he has responded to it, and been sworn, it is equivalent to entering his appearance, and submitting to the jurisdiction of the court. He must then answer all legal questions put to him. This is in accord with all the analogies of our law, and the only practical rule in such cases. For these reasons we dissent most earnestly from the conclusions of the majority in this case.

COOPER, J., concurs.

SHIN FORREST *v.* THE STATE.

CRIMINAL LAW. *Murder. Objections after verdict.* The prisoner being indicted on a single count for the murder of two persons named, went to trial upon the merits, and when the testimony developed the fact that the killing of each of the two persons was by a separate blow in the same transaction, made no objection to the evidence, nor moved the court to compel the State to elect for which killing it would proceed. Held, that the objection of duplicity comes too late after verdict and judgment, and a motion in arrest of judgment will be of no avail.

FROM HENRY.

Appeal in error from the Circuit Court of Henry county. C. ADEN, J.

T. C. FRYER for Forrest.

ATTORNEY-GENERAL LEA for the State.

COOPER, J., delivered the opinion of the court.

The prisoner has appealed in error from a judgment of conviction for the crime of murder in the first degree.

The indictment charges that the prisoner, on the first day of December, 1882, "unlawfully, feloniously, wilfully, deliberately, premeditatedly and maliciously did make an assault upon the body of one David Cruise and Jane Forrest, and they the said David Cruise and Jane Forrest he the said Shin Forrest, then and there did unlawfully, feloniously, wilfully,

deliberately, premeditatedly and of his malice aforethought, kill and murder." The prisoner went to trial upon the plea of not guilty without making any objection to the indictment. Upon the trial, the testimony showed that Jane Forrest was the mother and David Cruise the grandfather of the prisoner; that they were all living together in the same house; and that the prisoner killed them on the same night by separate blows with an axe helve, they being in different parts of the house in bed. No motion was made during the trial to compel the attorney-general to elect for which offense he would try the prisoner. The verdict of the jury was that "they find the defendant guilty of murder in the first degree as charged in the indictment, with possibly mitigating circumstances." The defendant moved the court for a new trial and in arrest of judgment. It is now assigned as error that the trial court overruled the motion to arrest the judgment. And the argument is that the indictment was bad for duplicity, and that the prisoner was tried for two offenses.

An indictment of only one count, in the above form, against a defendant for the murder of two persons would be good upon its face, for the murder might have been committed on both in the same degree, by one and the same act: *Kannon* v. *State*, 10 Lea, 390. This was the form of the indictment which was held to be good upon its face in *Womack* v. *State*, 7 Cold., 508. A demurrer or motion to quash the indictment for duplicity would not lie in such a case. But the defendant, as was decided in that case, so

soon as the testimony developed the fact that the killing was by separate acts although on the same occasion, and at any time during the trial, had the right to compel the State to elect upon which homicide it would proceed. And if it further appeared from the evidence that the two offenses were of different grades, and that the joinder of them was prejudicial to the prisoner, the court should set the verdict aside, and it would be error not to do so: *Kannon* v. *State*, 10 Lea, 386. In the case before us, the record leaves no doubt that the two crimes with which the prisoner stands charged and convicted were of the same grade. If the State chose to pursue the defendant for only one crime instead of for two crimes, it was for the interest of the defendant to acquiesce. And so he and his learned counsel manifestly thought. The question therefore, is, whether after such acquiescence, he is entitled to assign the fact as error.

In England it seems now to be settled that duplicity after verdict is no ground for a writ of error, and there seems to be no authority holding that it can be made the subject of a motion in arrest of judgment: 1 Bish. Cr. Pr., sec. 443. And the great weight of American authority is that the defendant cannot avail himself of the duplicity after verdict: *Id.* In this State it has been held in one case that the objection of duplicity comes too late after verdict of conviction for a misdemeanor, and cannot be made the subject of a motion in arrest of judgment: *State* v. *Brown*, 8 Hum., 89. In another case, it was said that in felonies duplicity might "most probably" be

taken advantage of by motion in arrest of judgment, but the point was expressly reserved, not being directly presented: *State* v. *Williams*, 10 Hum., 101. In a later case of felony, where the duplicity appeared on the face of the indictment, the court, after quoting the language used in the case last cited, held that the defendant by going to trial on the indictment "clearly waived all objection to it": *Scruggs* v. *State*, 7 Baxt., 38. In a still later case, where the duplicity appeared on the face of the indictment, the motion in arrest was sustained: *Morton* v. *State*, 1 Lea, 498.

In the case now before us the indictment is good upon its face, and therefore the motion in arrest of judgment is of no avail. That motion reaches only defects on the face of the record, and no others. It does not reach matters appearing only in the evidence on the trial: 1 Bish. Cr. Pr., sec. 1285. And the question is whether we shall reverse upon a circumstance developed by the evidence which would not be error at common law, upon which no objection was made in the court below, and by which we cannot see that the defendant was prejudiced in his defense. We are of opinion that no sufficient reason appears for interference with the judgment upon this ground.

Error is assigned on the charge of the court in relation to insanity, but the charge is almost in the exact language which, although brief, was held sufficient in *Stuart* v. *State*, 1 Baxt., 178. And besides, there was not a particle of proof tending to show the existence of any form of insanity. The witnesses who depose on the subject speak of the prisoner as

having good ordinary natural sense but extremely ignorant. The ignoble motive to this hideous tragedy seems to have been to get rid of a bed-ridden grandfather and a petulant mother.

By the Code, sec. 5257, where any person is convicted of a capital offense, and the jury who convicted him state in their verdict that they are of opinion that there are mitigating circumstances, the court may commute the punishment from death to imprisonment for life in the penitentiary. The opinion of the jury, even when unqualified is not binding on the court: *Lewis* v. *State*, 3 Head, 127. But the opinion is of course entitled to grave consideration: *Poe* v. *State*, 10 Lea, 673. In this case the jury have only found that there were "possibly mitigating circumstances." The recommendation in that form is attempted to be supplemented by one of the jurors, who says that ten of the jurors were for the verdict returned "with some mitigation," while the other two were for the same verdict "with possibly mitigating circumstances;" that all agreed to the verdict reported, a part of the ten believing that the court would not receive it, and that the jury would be remanded for further consideration of the case, in which event, the other two jurors seemed to think that the jury would agree to the verdict "with mitigating circumstances." The affidavit, it will be noticed, so far as it undertakes to state facts, does nothing more than the verdict itself. For the words "with some mitigation" are only equivalent to the words actually used. And where the affidavit speaks of what a part of the jury believed

would occur, or two of them thought might happen, it amounts at most only to the expression of an opinion, and is not entitled to any consideration. There are no mitigating circumstances in the case, and there being no error in the proceedings, the judgment must be affirmed.

BANK OF WEST TENNESSEE *v.* T. S. MARR *et al.*

PLEADINGS AND PRACTICE. *Scire facias. Plea to merits.* If to a *scire facias* against heirs, based upon a judgment against the personal representative, to show cause why execution should not issue against the real estate descended, the heirs appear and plead to the merits, they thereby waive any irregularity in the issuance of the *scire facias*, either in the preliminary order, or the form of the writ.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W. W. MCDOWELL, Ch.

Gantt & PATTERSON for complainant.

ESTES & ELLETT, W. M. RANDOLPH and WRIGHT, FOWLKES & WRIGHT for defendants.

COOPER, J., delivered the opinion of the court.

The case presented in this record is a branch of the litigation which was before this court at a former term, and the opinion in which is reported in 4 Lea,

578. One object of the litigation was to hold the stockholders of the Bank of West Tennessee liable for unpaid stock for the benefit of the creditors of the bank. L. P. C. Burford, a non-resident of the State, was one of these stockholders. He died on September 21, 1863, and S. R. Burford, also a non-resident of the State, on October 2, 1865, qualified as administrator of his estate. On March 27, 1877, the chancery court, in which the suit was then pending, rendered a decree in favor of E. B. McHenry, as receiver of the assets of the bank, against S. R. Burford, as administrator of L. P. C. Burford, deceased, for $11,759.26, balance found to be due from him on unpaid stock. On March 2, 1878, upon an affidavit of McHenry stating the names of the heirs of L. P. C. Burford, deceased, the clerk and master of the chancery court, made an order upon his rule docket for the issuance of a *scire facias* against these heirs to show cause why the judgment should not be revived against them. A *scire facias* was issued accordingly and executed on some of the heirs, and publication made as to the residue. The heirs appeared by counsel and filed pleas to the merits, setting up in defense the various statutes of limitation. Demurrers were filed to some of these pleas, and replications to others which were in their turn demurred to by defendants. These demurrers were all decided in favor of the plaintiff, and the defendants declining to plead further, a decree was rendered reviving the judgment against the heirs, and ordering an execution to issue against the lands which had descended to them. The

defendants afterwards brought the cause to this court by writ of error.

No question was made in the court below, either by motion to quash, plea in abatement or otherwise, to the regularity of the issuance of the *scire facias*, or to its sufficiency. On the argument before the Referees, the objections were taken that there should have been an order of court to sustain the writ, and that the writ itself was fatally defective. The Referees were of this opinion, and reported in favor of reversing the judgment below. The plaintiff alone excepted.

By statute, after recovering a judgment against the personal representative of a decedent, before taking out an execution against the real estate, the heirs or devisees must be summoned by *scire facias* to show cause why execution should not issue: Code, sec. 2259. Before the adoption of the Code, it was settled that decrees in equity might be revived, like judgments at law by *scire facias*, and also by motion or bill of revivor: *Carsen* v. *Richardson*, 3 Hayw., 231. The right to proceed by bill of revivor has not been affected by any legislation placing decrees in equity and judgments at law on the same footing in this regard. And if the bill of revivor may be replaced by a *scire facias* under the provisions of the statutes, as is expressly provided in the case of a bill of revivor upon the death of a defendant to revive a pending suit, the clerk and master may issue the *scire facias* at any time at the rules upon motion of the complainant: Code, secs. 4425, 4426. It is now provided by statute that even at law a judgment may be revived by or

against the heirs of a deceased plaintiff or defendant in the same manner, and under the same circumstances as pending suits are now revived under section 2849 of the Code, that is, when no person will administer on the estate of the deceased: Act of 1875, ch. 22. A revivor of a decree in equity by motion upon notice seems to have been considered proper in a recent case: *Douglass* v. *Menzies*, at Brownsville, cited in King's Digest, page 1361.

A *scire facias* to revive a judgment, or to have execution against realty descended is so far in the nature of a new suit that any defense may be made which will prevent the revivor, but it is in substance a continuation of the old suit, for the proper judgment is that the plaintiff have execution of the original judgment: *McIntosh* v. *Paul*, 6 Lea, 45, 47. It is a judicial writ, and in the nature of a declaration, and its sufficiency may be tested by demurrer or motion to quash: *Hayes*. v. *Cartwright*, 6 Lea, 143; *State* v. *Johnson*, 6 Baxt., 198. If there be no pleading, and the judgment be by default, on appeal or writ of error, mere irregularities would be of no avail, but it would be otherwise if there was a want of jurisdiction or a fatal defect in the *scire facias: Brewer* v. *State*, 6 Lea, 198. And the cause would be remanded for another writ: *State* v. *Patterson*, 7 Baxt., 246.

The order and *scire facias* in this case are fatally defective, and would undoubtedly have been held bad upon demurrer or motion directed to the fatal defect: *Hillman* v. *Hickerson*, 3 Head, 575; *Frierson* v. *Harris*, 5 Cold., 146. In the case last cited the *scire facias*

to revive a judgment against heirs was issued by the clerk of this court in vacation, and, like the writ before us, called upon the heirs to show cause why judgment should not be revived against them. The heirs appeared by counsel, but the mode of defense does not appear. It was doubtless made upon the motion to revive, and was probably in the nature of a demurrer or application to quash. It was held that there was no authority to issue the writ, and that it was defective in form. The present case would have been directly within the decision if any defense had been made directed to the obvious defects, or, as we have seen, if there had been no defense at all. And the question is, does the defense which was actually made to the merits condone or waive these defects?

The general rule undoubtedly is, and has been repeatedly recognized by this court, that appearance and defense to the merits waive all defenses which go merely in abatement of the writ or action. And this for the obvious reason that a party may prefer to contest the right involved without testing the regularity of the proceedings. The rule is peculiarly applicable to matters of pleading. "In pleading," says Overton, J., in a case at law, "an advanced step virtually waives exceptions which should be antecedently made": *Snapp* v. *Moore*, 2 Tenn., 240. And in equity any positive step on the basis of the regularity of a previous pleading waives any irregularity therein: *Seifreid* v. *People's Bank*, 1 Baxt., 200; S. C., 2 Tenn. Ch., 17. The rule of this court, under the Code, sec. 4516, is not to reverse except for some cause which goes to the merits,

if the party has appeared and made a defense of his own selection: *Odell* v. *Koppee*, 5 Heis., 88. And we have held in several cases of the character of the one before us, that although the *scire facias* be not sustained by the proper affidavit, or be defective in form, we would not look beyond the defenses which the party chose to rely on: *Taylor* v. *Miller*, 2 Lea, 153; *Whitworth* v. *Thompson*, 8 Lea, 480; *Bryant* v. *Smith*, 5 Cold., 113; *Fogg* v. *Gibbs*, 8 Baxt., 464. In the last of these cases Judge McFarland says that the revivor of the judgment is in the nature of a new suit to recover on the former judgment, and such judgment of revivor ought to be on *scire facias*, "or upon appearance of the defendant and waiver of the *scire facias*." We think the defendants in this case have waived the *scire facias*, and elected to try on the merits, and are concluded thereby. The demurrers to the pleas and replications, being special, would not reach a defect in the *scire facias*: *Taylor* v. *Miller*, 2 Lea, 153; *Hobbs* v. *Railroad Company*, 9 Heis., 526. And those demurrers were properly sustained.

The exception to the report of the Referees will be allowed, and the judgment below affirmed with costs.

D. W. COLLIER, Surviving Partner, etc., *v.* J. J. PULLIAM and JESSE LANE, Executors.

PLEADINGS AND PRACTICE. *Attorneys. Damages.* In an action against an attorney for a failure to bring suit upon accounts placed in his hands for collection, the plaintiff, in order to recover more than nominal damages, must show that the accounts were valid, subsisting debts.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

SMITH & COLLIER for Collier.

HARRIS & TURLEY for Pulliam.

COOPER, J., delivered the opinion of the court.

Thomas & Collier, a firm composed of John Thomas and D. W. Collier, were the successors of two other successive firms of which Thomas was a member. The last firm purchased the assets of its predecessors, including the book accounts. In 1870, Thomas died, and J. L. Pulliam, the testator of the defendants, became administrator of his estate. Pulliam was a lawyer, and, under the direction of Collier as the surviving partner of Thomas & Collier, the accounts were drawn off from the books of the firms to the amount of $21,000, and placed in Pulliam's hands for collection. Pulliam made large collections, all of which have been accounted for with the surviving partner, Collier. About the first of January, 1878, Pulliam

died testate, and the defendants are the surviving executors of his will. This suit was brought on May 22, 1878, to hold Pulliam's estate liable for a number of uncollected accounts upon the ground that Pulliam had neglected to make collections as he was bound to do, whereby these claims were lost. Upon the trial of the cause, the jury found a verdict in favor of the defendants. Upon the motion of the plaintiff for a new trial, the trial judge was of opinion that as to two of the accounts in controversy, the plaintiff had made out his case, and proposed to grant a new trial unless the defendants would allow judgment to go against them for the amount of these claims. The defendants consented to these terms, and judgment was rendered accordingly. But the plaintiff, not being content with the recovery, upon his motion for a new trial being overruled, filed a bill of exceptions, and appealed in error. The Referees have reported in favor of affirmance. The plaintiff excepts.

The error principally relied on is alleged to be in the following charge of the judge to the jury: "I also charge you that it is the duty of the plaintiff to prove that the accounts herein sued for were valid accounts, due and owing from the parties respectively against whom they ran, to your satisfaction, and if he fails to do so as to any of them he cannot recover thereon." The plaintiff requested the court to give to the jury the following instruction: "That if they found from the proof that the books and accounts were placed in the hands of Joel L. Pulliam as attorney for collection, then the burden of proof

was upon the defendants to show that the said Pulliam had exercised due diligence in the prosecution of suits and collection of claims so placed in his hands." The court declined to give the instruction, but said to the jury: "That if the plaintiff showed by the proof that Pulliam had been apparently negligent as to any item or items of account placed in his hands for collection, then the burden of proof would be shifted to the defendants, and they must account for Pulliam's failure to collect such item or items, and if the defendants failed to account for the same, the jury should find against defendants as to such item or items."

The plaintiff could only prove that the accounts sued for appeared upon the books of the firm, and offered no other proof to show that the accounts were valid, and due and owing by the apparent debtors. There was evidence tending to prove that some of the claims now in controversy, if valid, might have been collected from the supposed debtors for several years after they were placed in Pulliam's hands, and were now barred by the statute of limitations, or rendered worthless by the subsequent insolvency of the parties.

The substance of his Honor's charge is that the plaintiff could not recover without first showing that the accounts, for the failure to collect which the testator's estate was sued, were, when placed in the testator's hands, valid, subsisting debts of the persons against whom they were made out. And that after the plaintiff has made out a *prima facie* case of neg-

ligence, the burden of proof would be on the defendants to satisfactorily explain the testator's failure to collect. The error relied on is only in the first part of the charge.

If a claim or demand on a third party be received for collection by an attorney, it would be his duty, if not otherwise collected, to sue upon it in a reasonable time, or to notify his client of his reason for failing to do so. His failure to act would be a negligent breach of contract, for which he would be liable to nominal damages at least at the suit of his client. To recover actual damages, the burden would, upon general principles, be upon the plaintiff, and the *quantum* of damages would necessarily be regulated by the value of the claim lost by the failure to sue. It is, in fact, not easy to see how there can be other than nominal damages unless the plaintiff makes such proof. Some of the text books, accordingly, so state the law. Mr. Greenleaf says: "Where the remedy against an attorney is pursued by action at law, and the misconduct has occasioned the loss of a debt, the existence of the debt is a material fact to be shown by the plaintiff. If it were a judgment, this is proved by a copy of the record duly authenticated: *Russell* v. *Palmer*, 2 Wils., 325, 328. The fact of indebtment to the plaintiff by the debtor must also be proved by competent evidence, where it has not yet passed into judgment. In short, the plaintiff has to show that he had a valid claim, which has been impaired or lost by the negligence or misconduct of the defendant": 2 Gr. Ev., sec. 148. Mr. Greenleaf cites

for his authority 1 Stephens N. P., 434, where the law is thus enunciated, but without reference to any authority. In the only case on the subject in our books, this court expressly repudiate the doctrine that the attorney would be liable for claims received for collection unless he could show proper diligence, and say that the plaintiff must establish the want of diligence by proof, and also the extent of damages so resulting to him. "The affirmation (of the plaintiff) is that there was negligence," says Judge Freeman, in delivering the opinion, "and this negligence must be fairly made out, or else no recovery can be had at all. When the negligence is shown, then as a result damage and the extent of it must be shown—the latter being the measure of the recovery. * * Loss as well as negligence must be shown in order to recovery": *Bruce* v. *Baxter*, 7 Lea, 477.

The learned counsel of the plaintiff has cited several text writers who seem to lay down the general proposition, that when negligence is proved, it is for the attorney to defend himself by showing that the client has not been hurt by his negligence: Wood's Mayne on Dam., sec., 648; Whart. on Neg., sec. 752; Sherm. & Red. on Neg., sec. 220. The context shows that these writers have in their view the case where a judgment has gone against the client by the negligence of the attorney, and they all cite the same authority, namely, *Godefroy* v. *Jay*, 7 Bingh., 415. In that case the attorney was retained to defend an action of tort, and allowed judgment to go by default. The client was permitted to obtain a recovery against the

attorney for the amount of the judgment, without proving that he had a good defense to the original action. The rationale of the decision seems to have been that if the attorney had put in the defense of the general issue for his client, the plaintiff would have been compelled to make out his case, and that the burden was upon the attorney to show that there was a case against his client, rather than for the client to show that he had a good defense. But with deference, although the client was entitled to nominal damages in any event for the failure of the attorney to make defense, the extent of the damages would depend upon whether the client had a good defense. And so it seems to have been intimated in *Harter* v. *Morris*, 18 Ohio St., 492. Of course, the defense in such a case might depend upon the ability of the plaintiff to establish a cause of action, as well as upon the nature of the defense. And the court in a case of plain negligence on the part of an attorney would not be very exacting in its requirement of a *prima facie* showing in order to shift the burden to the other side. Be this as it may, a failure to properly defend or prosecute a pending suit is very different from a failure to bring a suit on an alleged debt. The validity of the debt is the only possible ground for the successful prosecution of such a suit, in the absence of which the client would be benefitted rather than damaged by the failure to sue.

The exceptions to the report of the Referees will be disallowed, and the judgment below affirmed. But the appellant will pay the costs of this court.

G. F. FARROW, Adm'r, *v.* T. S. FARROW *et al.*

HOMESTEAD. *Infant children.* Infant children occupying the homestead with their surviving parent at his or her death, are entitled to the homestead exemption during their minority, and cannot be deprived thereof either by their own act, or the act of third persons.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W. W. MCDOWELL, Ch.

FINLAY & PETERS for complainant.

ESTES & ELLETT and WEATHERFORD & ESTES for defendants.

COOPER, J., delivered the opinion of the court.

Bill by G. F. Farrow, as administrator of the estate of J. M. Farrow, deceased, for the administration of the estate as insolvent, and the sale of realty to pay debts. The claims of a number of creditors have been presented, proved and allowed, showing that the estate is largely insolvent, and the sale of the realty necessary. The infant children of the intestate claim homestead in the land. The chancellor held that the children were not entitled to homestead. Upon their appeal, the Referees report in favor of reversing the decree, and allowing the children homestead. The creditors except.

J. M. Farrow died intestate before the year 1879, leaving six children, two of whom were of age at the filing of this bill, and the other four under age. The intestate had lived for many years with his wife and children on the land in which homestead is claimed. His wife died before him, but he continued to live on the land with his children until his death. Between ten and twenty days after his death, J. J. Farrow, who had become the guardian of the minor children, removed them to the State of Mississippi, where he resided, and where he and they have since lived. He has rented out the land in which the homestead is claimed for the benefit of his wards. The guardian is himself a creditor of the intestate to the amount of over $3,000.

The Constitution of 1870, Art. XI., sec. 11, provides that: "A homestead in the possession of each head of a family, and the improvements thereon to the value in all of one thousand dollars, shall be exempt from sale under legal process during the life of such head of a family, to inure to the benefit of the widow, and shall be exempt during the minority of their children occupying the same." The act of 1870, 2nd session, ch. 80, passed in compliance with the provision of the Constitution contained this provision: "A homestead in the possession of each head of a family, and the improvements thereon, to the value in all of one thousand dollars, shall be exempt from sale under legal process during the life of such head of a family, and which shall inure to the benefit of his widow, and shall be exempt from sale in

any way, at the instance of any creditor or creditors, during the minority of the children occupying the same, and until the youngest child reaches the age of twenty-one years." After several provisions relating to the mode of allotting the homestead, section 6, is "The homestead exempt in the possession of a husband shall, upon his death, go to his widow during her natural life, with the products thereof, for her own use and benefit, and that of her family who reside with her, and, upon her death, it shall go to the minor children of the deceased husband, free from the debts of the father, mother, or said children; and, upon the death of said minor child or children, or their arrival of age, the same may be sold," etc.

Both the Constitution and the statute give the homestead in the possession of the head of a family, and provide for its continuing exempt from sale under legal process for the benefit of the widow, and during the minority of their children "occupying the same." Actual possession and occupancy of the homestead seem to be intended to be essential to the continued existence of the exemption. This court has accordingly uniformly held, under the act of 1870, that the homestead would be lost by the permanent abandonment of its occupation by either the husband or the wife. And in the only case in which the right of a minor child has been set up in our books, where the widow had lost her right by abandonment, it was expressly held that to preserve the right of homestead to a minor child, continued occupancy after

the death of the mother was essential: *Hicks* v. *Pepper*, 1 Baxt., 42. This decision was, however, based upon the assumption that the mother had the right to control the residence of the infant.

"The general and only sound doctrine," says Judge Thompson, "is that the homestead reservation which passes, under the statutes of the various States, to the widow and minor children, upon the death of the husband and father, is contingent upon occupancy of the premises by the widow and children, as in other cases. Otherwise the exemption becomes, not a reservation of a homestead, but a reservation of land of a certain quantity or value, irrespective of its uses. But, he adds, a tendency is discovered on the part of the courts to relax the requirement of literal occupancy by a widow, and to dispense with it altogether in the case of orphan children": Thomp. on Homestead, sec. 550. It is upon the latter class of decisions, cited in section 243 of the same work, that the Referees rest their report. And it must be admitted that in the case of minor orphan children, who cannot possibly in person manage the homestead, and may not be able to find a guardian to occupy it with them, the courts have a very strong inducement to follow the spirit of the act, and not its strict letter. Accordingly, the courts of Arkansas, under a statute which gives the homestead exemption "during the time it shall be occupied by the widow, child or children," have held that actual occupancy by the minor children, where both parents are dead, is not necessary. It is the duty of the guardian,

they say, to take possession of the homestead, and lease or rent it for the benefit of the children: *Booth* v. *Goodwin*, 29 Ark., 633; *Johnston* v. *Turner*, 29 Ark., 280. These courts lay stress upon the fact that the children, after the death of their parents, are incapable of waiving or abandoning the homestead right either by act or deed. And it may be added in the case now before us, the guardian had no authority to change the domicile of the wards: *Allen* v. *Thomason*, 11 Hum., 536. It also appears that the guardian of these wards had an interest in conflict with their rights by reason of the fact that he was a creditor of their father's estate.

We have held, in accord with the current of authority, that after the right of homestead has been once acquired by the head of a family, and the homestead occupancy is still continued, the right will not be lost by the death or absence of the wife and children: *Webb* v. *Cooley*, 5 Lea, 722. And we concur with the Referees in thinking that the fact that the wife died before the father would not affect the right of the children to the homestead. The whole case is therefore narrowed down to the question of the necessity of actual occupation by the infant children, or, *per contra*, the effect of their involuntary removal.

A majority of the court are of opinion that the right of homestead of minor children is not dependant upon the actual and continuous occupation of the premises, and that the words of the statute "occupying the same." mean, and are complied with by occupying the homestead at the time the right accrues. Af-

ter the right has accrued, the infant cannot waive it, nor, in view of his disability, deprive himself of it by any act of his own. And *a fortiori* he cannot be prejudiced in his right by the act of a third person. The Legislature, recognizing the right of the parents of children to change their residence and domicil, provided that the homestead exemption should only inure to the benefit of the minor children occupying the same with their surviving parent at his or her decease. It would be contrary to every principle of law relating to the disability of infancy to allow them to be deprived of the right, after it has once accrued, either by their own act or the act of others. And we are unwilling to put a construction upon doubtful language of a statute which would lead to such a result.

The exceptions to the report of the Referees will be disallowed, the decree below reversed, and a decree rendered here in accordance with this opinion, and the cause remanded. The creditors of the estate will pay the costs of this court.

E. R. LANCASTER *et al* v. E. R. LANCASTER JR., *et al*.

1. MARRIAGE SETTLEMENT. *Infancy.* Although both of the contracting parties to an ante-nuptial settlement of the wife's property, real and personal, in trust for her and her heirs, be under age, the settlement would at most only be voidable, not void, by reason of the infancy.

2. SAME. *Same. Disaffirmance of contract.* The husband might disaffirm the contract so far as he was personally concerned, notwithstanding the subsequent marriage, and would affirm it by acts or unreasonable delay.

3. SAME. *Same. When right to disaffirm accrues.* The right of an infant to disaffirm in equity a conveyance of land or personalty because of infancy, accrues as soon as the deed is executed, and, therefore, a woman who executes an ante-nuptial settlement, and then marries while under age, may affirm or disaffirm the deed during coverture; and unreasonable delay, with a recognition of the deed in the meantime by accepting and insisting upon its benefits will validate it.

4. SAME. *Trust settlement. Estate.* A trust settlement of the wife's own property to her separate use without any power of anticipation, and with only the limited right of disposition by last will, or instrument in the nature of a last will, does not give the wife an absolute estate in the property.

5. CHANCERY PLEADINGS AND PRACTICE. *Suits in respect to separate estate. Parties.* The rule of equity is that the husband must be made a defendant to all suits in respect to the wife's separate estate, and not a complainant, although no question arise between him and the wife; and when the husband seeks an object adverse to the wife, the bill is considered his bill, and the wife must be made a defendant.

FROM MADISON.

Appeal from the Chancery Court at Jackson. T. C. MUSE, Ch.

BULLOCK & HAYS for complainants.

CHARLES B. HERRON for defendants.

COOPER, J., delivered the opinion of the court.

On September 2, 1850, Susan R. Connally and E. R. Lancaster, being both then under age, in anticipation of their intermarriage, which took place shortly afterwards, entered into an ante-nuptial contract, by which the land now in question and certain slaves, the property of the intended wife, were settled upon her to her sole and separate use, enjoyment and control during the joint lives of her and Lancaster; and if the land was rented out, to pay her the proceeds during their joint lives to her sole and separate use from time to time, so that she should not sell, mortgage, charge, or otherwise dispose of said lands, or the proceeds thereof, by way of anticipation; and if she should survive her husband, to convey and deliver the property to her and her heirs, but should she die during the life of her husband, in trust, after her decease, to convey the land and its proceeds to such person or persons as she, by her last will and testament, notwithstanding her coverture, or by any writing in the nature of, or purporting to be her last will and testament, should limit, bequeath, devise and appoint; and in default thereof upon trust to pay, transfer, assign and convey the same to the next of kin and heirs at law, under the laws of descent and distribution, of the said Susan R.

The contracting parties intermarried, and lived in this State until 1867, when they removed to the State of Virginia, where they have since resided. On Sep-

tember 13, 1872, E. R. Lancaster filed a bill in the chancery court of Madison county, in which county the land in question lies, against his wife, a new trustee appointed after the death of the original trustee, and his children by his wife, then five in number, to have the land sold, and the proceeds reinvested under the same limitations and powers, and upon the same uses and trusts as contained in the original deed, upon the ground that it was manifestly for the interests of all concerned. The bill recited that it was filed at the request of the wife for the purposes mentioned. Such proceedings were had in the cause that on November 9, 1878, a final decree was rendered in accordance with the prayer of the bill, and authorizing the land to be sold by the clerk and master. The decree recites that the cause was heard "upon the bill, *pro confesso*, answers, and answers of the minors by guardian *ad litem*." But it does not appear how the defendants were brought before the court, nor whether the wife filed any answer, nor against whom an order *pro confesso* was taken. No sale, it seems, could be effected under the decree.

On May 6, 1881, the present bill was filed by E. R. Lancaster and wife, and three of their children, who were of age, against four other of the children, alleged to be minors, and the trustee under the marriage settlement. The object of the bill is to have the settlement construed and the wife declared to have an absolute estate in fee in the land with full power of disposition; and, if mistaken in this, that the settlement be set aside as of no force, because, first,

the property being hers, the settlement could not affect her; and secondly, because the wife was under age at the execution of the instrument, and has since been a *feme covert.* The record shows the appointment of a *guardian ad litem* for the infant defendants, and an answer put in by him, but does not show any service of process on the infants, or publication against them as non-residents. All the parties, except the trustee, are alleged to be non-residents of the State. There is the recital of an entry on the minutes that a *pro confesso* had been taken against the trustee. On final hearing the chancellor was of opinion that the marriage settlement was only voidable, not void, by reason of the infancy of Susan R. Connally at the time of its execution, and that she had ratified it after she came of age by her long acquiescence, and by the bill of September 13, 1872 He was further of opinion that the wife had no power of disposition except in accordance with the terms and limitations of the settlement. From the decree of the chancellor the complainants appealed. The Referees have reported in favor of affirmance. The exceptions of the complainants open the case. No point is made that the defendants are not properly before the court by service of process or publication, and we understand that the omission of the evidence of these facts from the transcript is merely clerical.

Although both Lancaster and his intended wife were infants at the time the ante-nuptial conveyance in question was executed, it was based upon a valid contract and a good consideration, marriage being al-

ways a sufficient consideration for such settlements. And if it be conceded, as perhaps it may be, that the infancy of the parties rendered the deed voidable at the instance of either within a reasonable time after coming of age, the lapse of over a quarter of a century after that period is, of itself, if there be nothing to do away with the effect of delay, sufficient to validate it. So far as the husband is concerned, mere delay, under the circumstances, for an unreasonable time after coming of age would bar his right: *Hook* v. *Donalson*, 9 Lea, 56. His subsequent marriage would, of course, place him under no disability to act. In addition, we have his bill of September 13, 1872, sworn to by him, in which, upon the basis of the validity of the ante-nuptial deed, he seeks to have the land sold for the benefit of his wife and children, and the proceeds of sale reinvested upon the same uses and trusts. The record of that case, so far as it has been copied into this transcript, does not show whether the wife made herself an assenting party to the proceedings by answer in person, as required by the statute: Code, sec. 3325. A decree without such an answer was a nullity.

If, as suggested in argument, the wife did not become a party to that suit in the prescribed mode, the proof shows that she has continued for over a quarter of a century after coming of age to recognize the deed as valid, and acted under it by having a new trustee appointed in place of the original trustee who had died, renting out the land through him, and receiving the rents. Such acquiescence and

conduct, and perhaps acquiescence alone, for so long a period, would be sufficient to validate the deed, unless the disability created by the subsequent coverture would prevent the result. It is well settled that where both of the disabilities of infancy and coverture exist when the husband and wife join in a conveyance of the wife's land, the wife's right to avoid the deed will not be lost until a reasonable time after the removal of both disabilities: *Matthewson* v. *Davis*, 2 Cold.. 451; *Sims* v. *Everhardt*, 102 U. S., 300. At the date of the execution of the deed before us, the female grantor was only under the disability of infancy. And the question is, what effect did her subsequent coverture have upon her power to affirm or disaffirm her voidable deed of land? The point is one of some nicety, for it may depend upon the time when the right to act accrued.

The one disability, this court has held, can derive no aid from, or have any effect upon the other *Scott* v. *Buchanan*, 11 Hum., 468. The two disabilities cannot be added to each other if they do not co-exist when the right accrues: Code, sec. 2759; *McDonald* v. *Johns*, 4 Yer., 258. If, therefore, the power to disaffirm arose as soon as the deed was executed, the subsequent disability of coverture would not affect the right. The better authorities agree that a contract of a personal kind, or relating to personal property, whether executed or executory, may be avoided under age and immediately: *Nashville & Chattanooya Railroad Co.* v. *Elliott*, 1 Cold., 611; *Robertson* v. *Simmons*, 4 Heisk., 135; *Stafford* v. *Roof*, 9

Cow., 628; *Willis* v. *Twombley*, 13 Mass., 204. The old rule was that an infant could not disaffirm his deed conveying land while he remained under age, the reason being, according to the authorities, that a disaffirmance works a reinvestiture of the estate in the infant, and he is presumed not to have sufficient discretion for that: *Zouch* v. *Parsons*, 3 Burr., 1808; *Roof v. Stafford*, 7 Cow., 183. But even where this rule rigidly prevailed, the infant might enter the premises and take the profit: *Bool* v. *Mix*, 17 Wend. 119. And he might by next friend go into equity and have a receiver: *Matthewson* v. *Johnson*, 1 Hoff. Ch., 560. The rule was mentioned in some of our earlier cases without being involved or decided: *Scott* v. *Buchanan*, 11 Hum., 474. But it was said in *Singleton* v. *Love*, 1 Head, 357, that the husband and infant wife might affirm or disaffirm a sale of the land and personalty of the wife made by the guardian at her request before the marriage. And the power of the court of chancery in this State to validate a void or voidable sale when for the interest of an infant is well settled: *Kirkman, ex parte*, 3 Head, 518; *Bryant* v. *McCollum*, 4 Heis., 521; *Elliott* v. *Blair*, 5 Cold., 185. It is equally well settled that a married woman, who was also an infant when she joined in a conveyance of her land, may in equity disaffirm the sale during coverture: *Dodd* v. *Benthal*, 4 Heis., 601. In *Temple* v. *Hawley*, 1 Sandf. Ch., 153, it was held that a married woman, who, on the eve of her marriage, and while an infant, had made a settlement of her real estate, might af-

firm it after she came of age during coverture. And in *Whichcote* v. *Lyle*, 28 Penn., 73, it was held that the husband was bound by a marriage settlement of the wife's realty, although the wife was a minor when it was entered into, and that the weight of authority inclines in favor of the right of a *feme covert* to disaffirm the settlement during the coverture. The very fact that cumulative disabilities are not allowable requires, *ex necessitate*, to prevent a failure of justice, that a wife must have the power to affirm or disaffirm a conveyance of land made during infancy, for she may come of age before the coverture, and yet for too short a period of time to bar her right. We think the better doctrine to be that a wife may in equity affirm or disaffirm an ante-nuptial marriage settlement of either land or personalty, or both, voidable by reason of her infancy.

The deed in question gives the wife during her coverture with the present husband only a limited power of disposition by last will or instrument of writing in the nature of a last will, and not an unlimited power: *Hoyle* v. *Smith*, 1 Head, 90. The interest of the children is only contingent, and may be lost by the exercise of her power by the mother: *Hamilton* v. *Insurance Co.*, 3 Tenn. Ch., 124, affirmed 6 Lea, 402. The chancellor and the Referees have, therefore, construed the instrument correctly.

The husband having no interest under the deed of settlement, had no right to ask for a construction of it, and was acting in antagonism to his wife in seeking to set the deed aside. The rule of equity is

that the husband must be made a defendant to all suits instituted in respect of the wife's separate estate, although no question arise between him and his wife: *Wake* v. *Parker*, 2 Keen, 59; *Sigel* v. *Phelps*, 7 Sim., 239. And where the husband seeks an object adverse to the wife, the bill is considered as his bill alone, and the wife must be made a defendant: *Hanvott* v. *Cadwallader*, 2 R. & M., 545; *Alston* v. *Jones*, 3 Barb. Ch., 401. Upon its face this is clearly the bill of the husband alone, and there is nothing to show that the wife has ever given her consent to the proceedings in such a way as to make them binding upon her.

The report of the Referees will be confirmed, and the chancellor's decree affirmed with costs against all the complainants except the wife.

THE STATE *v.* SUT GARDNER.

CRIMINAL LAW. *Lost papers. How supplied.* A lost presentment may be supplied upon satisfactory affidavits independent of the recollection of the judge. *State* v. *Harrison*, 10 Yer., 542, overruled.

FROM OBION.

Appeal in error from the Circuit Court of Obion county. C. ADEN, J.

ATTORNEY-GENERAL LEA for the State.

F. W. MOORE for Gardner.

FREEMAN, J., delivered the opinion of the court.

At March term, 1883, ten presentments were returned, found true bills, into the circuit court for Obion county, against the defendant, Gardner. Capias was issued on all these, and defendant arrested. In August after this the clerk's drawer was broken open, and the presentments all stolen and never recovered.

After this, in open court, the energetic district attorney-general of this district moved the court to supply the lost papers, and tendered the affidavit of the clerk, showing the loss and circumstances attending it, together with his own affidavit, showing the papers by him tendered to supply the loss were clearly the same as the papers stolen. This was shown by the fact that the presentments were printed forms, the same as then in his possession, and the facts as to dates, etc., necessary to be inserted in writing, were taken from the notes found in the grand jury book, together with the memory of the officer, of the facts from information had by him at the time of drawing the papers from the witness on whose testimony they were found. There is no question but the proof of the identity of the matter of the papers was clearly made out.

His Honor, the circuit judge, refused to allow the papers supplied, basing his ruling upon the fact that

from his own statement, found in the record, he had never read the presentments, and therefore could not himself say whether the papers tendered were correct.

The ruling of his Honor is based on the early decision of this court: *The State* v. *Harrison*, 10 Yer., 542. That case is evidently the result of the technical views of our courts at that day, and the theory then prevalent, that all technical objections should be allowed to prevail in favor of the defendant in criminal cases. No such views now prevail, nor would they be in accord with the spirit in which the criminal law is now and should be administered. Judge Turley, in the above opinion, seems also to lay much stress on the danger to the lives and liberties of the citizen. He says: "To establish the principle that a judge might supply a lost indictment upon affidavits of others, independent of his own recollection, would, as we think, be exceedingly dangerous to the lives and liberty of the citizen." We are unable to appreciate at this day the force of this reasoning. When analyzed, it means simply that in a case like this, where the best evidence possible is furnished of the correctness of the supplied papers, it should not be done, because of failure to get the evidence of the judge who would be the party least likely ever to be able to furnish such evidence, who in this case (as it would be found practically in any case) had never read the indictment or presentment, and who, by the duties of his place is never required or expected to do so. As to the danger to the citizen, that has no better support in reason. What forcible difference it can make to an innocent

man whether the proof of his innocence be presented to a jury, upon an original or copy of a presentment, is to us unseen. If he be guilty, then he deserves to be convicted, no wrong is done him, and the law is vindicated. Happily such views have all passed away.

The plain principle of the common law and of sound reason should apply in a criminal case as well as in civil cases, that is, when the papers are lost, they shall be carefully and accurately supplied, by satisfactory evidence of their loss and their contents.

While we have no doubt the law is as we have stated, and the papers were properly offered to be supplied in this case under the rules of the common law, we think, a fair construction of the act of 1847–8, sec. 3907, of the Code would include this as well as civil causes. It is: "any record, proceeding or paper filed in any action at law or equity, if lost or mislaid unintentionally, or fraudulently made away with, may be supplied upon application, under the orders of the court, by the best evidence the nature of the case will admit of." This may well be held to be a criminal action pending at law against defendant, under the definition of Bacon, who says actions are either criminal or civil—criminal are either where judgment of death, as appeals of death or robbery, or only to have a fine for the king or imprisonment: See Bacon Abridged of Vol. 1, 63.

A more liberal rule in fact might well be adopted in criminal cases like the present, where no other papers seem to have been stolen, because the grave sus-

picion must be indulged that in such a case the defendant has been the party guilty of the abstraction, or was in some way actively connected with it—he the only party who has the slightest interest in the destruction of the papers. To hold that the papers could only be supplied from the memory of the judge is practically to hold that they could not be supplied at all, and thus hold out an inducement to parties prosecuted to surreptitiously obtain and destroy the papers, and thus avoid the penalty of the law. Still more, the higher the crime or the heavier the penalty likely to be incurred, the greater the temptation, and so the evil tendency of the view is still more intensified in criminal cases.

For these reasons we overrule the case in 10 Yer., and hold the court erred in not permitting the papers supplied. The case will be remanded to be proceeded in under this opinion.

IKE THARPE *v.* THE STATE.

1. CRIMINAL LAW. *Murder Charge of court* The prisoner being on trial for murder, the trial judge, upon the hypothesis that the prisoner had attacked the deceased with intent to commit murder in the first degree, and that at the moment he was jerked away before doing any injury, a third person, without any concert with him, killed the deceased, charged the jury as follows: "Should you fail to find from the proof a conspiracy, but find that the defendant wilfully and unlawfully engaged the deceased in a fight, and thereupon Eli-

jah Tharpe, without concert between himself and the defendant, killed the deceased, and you further find that the defendant assailed the deceased wilfully, deliberately, maliciously and premeditatedly with the intent to kill him, then the defendant would be guilty of murder in the first degree." Held, that the charge was erroneous.

2. SAME. *Same. Same.* His Honor should have qualified the charge by saying to the jury, that if, at the moment the fatal stroke was given by Elijah Tharpe, the fight between the defendant and the deceased had been terminated by the pulling away of the defendant from the deceased, or if the principal object of Elijah Tharpe was not to assist the defendant, but to carry out a purpose of his own, then the defendant, in the absence of any concert between the two, would not be guilty of murder in the first degree.

FROM HENRY.

Appeal in error from the Circuit Court of Henry county. C. ADEN, J.

HU. C. ANDERSON, S. J. TAYLOR and L. M. THARPE for Tharpe.

ATTORNEY-GENERAL LEA for the State.

COOPER, J., delivered the opinion of the court.

The prisoner has appealed in error from a judgment of conviction of the crime of murder in the first degree committed on the body of John Jones.

On the occasion of the killing the prisoner and the deceased, both colored men, were, with a number of colored people of both sexes, at what the witnesses call a "festival," held in a house which had been rented by Charles Tharpe, but into which he had not yet moved. The prisoner had on that day taken a gun to the house and left it there. After the crowd

had assembled, there was dancing, in which the defendant and others joined. Liquor could be had by those who wanted it, but no one seems to have been visibly intoxicated. The witnesses say that the defendant was sober. Not long before the killing the prisoner, his brother Lije Tharpe, and two associates, who are named, made a good deal of fuss by loud talking and cursing. Lije, in the presence of the defendant, said that the fuss was about John Jones, who had charged him with being a thief. It is also proved by a witness for the State that an hour or two before the killing, the defendant told him that his brother Lije intended to kill Jones that night, and that he, defendant, intended to be in it. The witness told Jones of this conversation, which he seems to have treated very lightly. Afterwards, however, Jones went out of the house, and was preparing to leave the place. About this time Lije Tharpe went into the house and got the gun the defendant had brought there. Charles Tharpe tried to take it from him, and in the struggle twisted off the stock, leaving the barrel in Lije's hands. During the struggle the prisoner came up, and seized Charles Tharpe, cutting him in several places with a knife. After the struggle, the prisoner started in the direction of Jones, saying that Jones was the man he wanted to meet. Jones was then standing quietly talking to a woman. The prisoner went up to him, caught him by the collar with one hand, and raised over him an open knife with the other, saying, with an oath, "what have you got to do with this fuss?" Jones replied, "nothing,"

to which the prisoner responded, with an oath, "you are a liar." One of the State's witnesses, who was standing near, advanced to the defendant and drew him back by the collar of his vest, he having on no coat. It required, says the witness, no great force to pull him back. Just then, Lije Tharpe came up behind Jones, and struck him two blows over the head with the gun barrel, from the effects of which he died in ten days.

The trial judge, after instructing the jury correctly as to what it takes to constitute a conspiracy, and the effect upon the defendant's guilt of conspiracy or concert between him and his brother, proceeded in his charge as follows: "But should you fail to find from the proof a conspiracy, but find that the defendant wilfully and unlawfully engaged the deceased in a fight, and thereupon Elijah Tharpe, without concert between himself and the defendant, killed the deceased, and you further find that the defendant assailed the deceased wilfully, deliberately, maliciously and premeditatedly with the intent to kill him, then the defendant would be guilty of murder in the first degree, and you should so find." Error is assigned on this part of the charge.

The charge is based upon what was said by this court in *Beets* v. *State*, Meigs, 106. In that case James Beets and George Beets were indicted for murder in the first degree committed on the body of Samuel Rayle. James Beets and Rayle had some angry words, and were about to engage in a fight. George Beets interfered, saying they should not fight,

but that if any fighting was to be done, he would do it; whereupon Rayle struck him, and a fight between them ensued. While the fight was in progress, James Beets returned, and shot Rayle with a pistol, from the effect of which shot he died. The trial judge charged the jury that if George Beets engaged in the fight in self-defense, and while thus fighting, James Beets shot Rayle without the knowledge or consent of George, George would be guilty of no offense. But if George Beets fought willingly, so that he would be guilty of an affray, and while thus fighting, if James Beets shot Rayle, it would be manslaughter in George, although James shot without the knowledge or consent of George. The jury found both defendants guilty of manslaughter. Upon appeal in error this court said, per Green, J.: "It is certain that if George Beets in the fight had himself killed Rayle it would be manslaughter. He was not fighting in self-defense, but was engaged willingly in the combat. It is laid down in Archbold, and also in 1 Hawkins, ch. 31, secs. 35, 56, that if when two are fighting, a third come up and take the part of one of them, and kill the other, this will be manslaughter in the third party, and murder or manslaughter in the person whom he assisted, according as the fight was deliberate and premeditated, or upon a sudden quarrel. The principle is this: if a party be engaged in an unlawful act, and another assist him, and actually perpetrate the mischief, the first party shall be held responsible as though he had been the sole perpetrator himself. If a man is fighting with

another, not intending to kill, but by some unlucky blow death ensues, he is guilty of manslaughter; and why is this? Not because he intended to inflict death, but because he was engaged in an unlawful act, and the blow and the death were consequences of that act, and he must be responsible for it as though he had designed the result. Upon the same principle it is that he is responsible to the same extent, though the fatal blow be struck by another who assisted him without any concert on his part. The assistance is given because he is engaged in an unlawful act; and as he unlawfully creates the occasion for the interference and assistance of the third party, he must answer for the consequences as though he had been the sole actor."

It will be noticed that the intervention in Beets against State, as well as in the case cited from the text books, was while the two original combatants were fighting, and that it was in aid of one of them, the principal motive of the intervener being to assist him: 1 Hawkins, sec. 49, 50. The law would be otherwise if the original combatants had been, or were separated when the intervention occurred, or if the third party intervened for his own purposes. For, on the first point, an act and evil intent must combine to constitute in law a crime: 1 Bish. Cr. Law, sec. 206. No amount of intent alone is sufficient; neither is any amount of act alone; the two must combine: *Id.*, sec. 430. And generally, perhaps always, the act and intent must concur in point of time: *Id.*, sec. 207. On the second point it may be said that a per-

son is responsible for what of wrong flows directly from his corrupt intentions; but not, though intending wrong, for the product of another's independent act: 1 Bish. Cr. Law, sec. 641. It has accordingly been held by this court that if, during an affray between the prisoner on the one side and the deceased and another on the opposing side, the deceased be accidentally killed by some one who was co-operating with him, and by a blow aimed perhaps at the prisoner, the prisoner would not be responsible for the act: *Manier* v. *State*, 6 Baxt., 595. So it has been held that if there be a riot, and an innocent third person is accidentally killed by those suppressing it, the rioters would not be guilty of the homicide: *Commonwealth* v. *Campbell*, 7 Allen, 541. "It would be a monstrous doctrine," says Judge Sneed in 6 Baxt., 600, "to hold that when a party intended to kill, but did not kill, and a party with whom the first was in no complicity, accidentally or recklessly kill the adversary of the first party, that the latter should suffer the consequence of such reckless or casual act."

The charge now under consideration is, in substance, that if the defendant assailed the deceased, and engaged him in a fight with the intent necessary to constitute murder in the first degree, and Elijah Tharpe, without concert with the defendant, killed the deceased, the defendant would be guilty of murder in the first degree. If the law of Beets' case be conceded to be sound, the present charge is inaccurate and misleading in not containing the limitations of the law as expounded in that case. These limitations, as we have

seen, are that the original parties were still fighting, and that the principal motive of the intervening third party was to assist the defendant. His Honor, the trial judge, should have qualified the charge by saying to the jury, that if, at the moment the fatal stroke was given by Elijah Tharpe, the fight between the defendant and the deceased had been terminated by the pulling away of the defendant from the deceased, or if the principal object of Elijah Tharpe was not to assist the defendant, but to carry out his own purpose, then the defendant, in the absence of any concert between the two, would not be guilty of murder in the first degree.

For this error in the charge, the judgment must be reversed, and the cause remanded for another trial.

ASA SELBY *et al.* *v.* H. J. HOLLINGSWORTH *et al.*

DESCENT. *Children of mother's sister.* In the descent of the realty of an intestate to the heirs on the part of his mother, under the Code, sec. 2420, sub-sec. 2, the living children of a sister of a mother will take to the exclusion of the half brothers on the side of the deceased son of a deceased daughter of the sister.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W. W. MCDOWELL, Ch.

Selby v. Hollingsworth.

METCALF & WALKER for complainants.

POSTON & POSTON for defendants.

COOPER, J., delivered the opinion of the court.

Louis Selby, Jr., a citizen of this State, died in May, 1881, intestate, unmarried and without issue, leaving him surviving neither brother or sister or their issue, nor father or mother. He died the owner of lands acquired by him in his life time. Under the statute of descents these lands were inherited "in equal moieties by the heirs of the father and mother (of the intestate) in equal degree, or representing those in equal degree of relationship to the intestate; but if such heirs, or those they represent, do not stand in equal degree of relationship to the intestate, then the heirs nearest in blood or representing those who are nearest in blood to the intestate, shall take in preference to others more remote": Code, sec. 2420, sub-sec. 2.

There is no controversy as to the heirs on the part of the intestate's father. The only question is as to the heirs on the part of the mother. She died in 1853, leaving a brother and sister. The brother died young, unmarried and without issue. The sister married J. C. Hollingsworth, and had by him three children, H. J., Lucinda, and Alice Hollingsworth. The first two are still living. Alice married W. A. Cook, and died in 1862 leaving one child, John Cook, who died in 1872, unmarried and without issue. W. A. Cook, the father of John, married again, and had five children by his second wife. The only question in the case is whether

these half brothers and sisters of John Cook are entitled to inherit any part of the lands of Louis Selby, Jr.

H. J. and Lucinda Hollingsworth are the heirs of Selby's mother in equal degree of relationship to him. John Cook, if alive, would represent his mother, who was also in equal degree, with her brother and sister, of relationship to the intestate. The present Cook children are not in equal degree of relationship to the intestate, nor in fact in any degree of relationship to him. The learned counsel of the Cooks, while conceding this, insists that they represent John Cook, being his heirs. But the statute calls for an heir "representing those in equal degree of relationship to the intestate," not for a person representing one who is himself only a representative. The Cooks in no sense represent John's mother, and it is only by representing her that they can bring themselves within the statute. The heirs of Louis Selby, Jr., on the part of his mother, who can take under the statute are only such heirs as would have inherited from the mother if she had survived the son, and then died: *Miller Wills*, 2 Lea, 62. For such heirs would be the only heirs who could be in equal degree, or representing those who are in equal degree to the intestate. In that event, her heirs would have been, under the Code, section 2420, sub-section 1; the surviving children of her sister. The Cooks could not have inherited any part of her estate, for they are in no way related to her in blood, nor of course to her son. The statute itself shows what is meant by representa-

tion by section 2420, sub-section 1, which defines the representation of lineal descendants, and sub-section 2, which provides for the representing of brothers and sisters by their lineal descendants.

Affirm the decree with costs.

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY *v.* BARBARA WEAKS.

ACTIONS, LOCAL AND TRANSITORY. *Plea in abatement.* Where a justice of the peace in Carroll county issued a civil warrant charging the defendant, a railroad corporation, with "wilfully and negligently burning 300 pannels of rail fence, 50 apple trees, 25 acres of timber and forest trees, and two acres of corn in a field," and the defendant pleaded in abatement that the land on which the rails were built, and the trees, timber and corn were growing, was wholly in Benton county. Held by a majority of the court that a demurrer to the plea was properly sustained.

FROM CARROLL.

Appeal in error from the Circuit Court of Carroll county. T. J. CARTHEL, J., presiding by interchange.

HAWKINS & TOWNS for Railroad.

JAS. P. WILSON for Weaks.

DEADERICK, C. J., delivered the opinion of the court.

This is an action upon the facts of the case, begun by defendant in error before a justice of the peace of

Carroll county. The warrant charges the defendant below with "wilfully and negligently burning three hundred pannels of rail fence, fifty apple trees, twenty-five acres of timber and forest trees, and two acres of corn in a field."

The defendant pleaded in abatement that the land on which the rails were built, and the trees, timber and corn were growing, was in Benton county, and no part of the same was in Carroll county.

The plaintiff demurred to this plea and the court sustained the demurrer, and upon trial, verdict and judgment were rendered for her, and defendant has appealed in error to this court.

We are of opinion that there is evidence to sustain the verdict. But it is insisted that the action in this case is local in its nature, and was brought in a different county from that in which the cause of it arose, and that the court below had erred in overruling the defendant's plea in abatement.

The case cited in 5 Lea, 600, only decides that an action against a corporation for personal injury may be brought in any county where the company has an office or agency. But it does not hold, nor do the sections of the Code cited maintain the proposition contended for, that an action for injury to realty may be brought in any other than the county in which it is situate. An action for personal injury is a transitory action.

This is an action for injury to the realty, and such injury could only have arisen at the place where the land is, and the suit must be brought in the county

where the land lies, in all actions for the recovery of the land itself, or for waste, etc: 1 Ch. Pl., 297.

And so also where an action is brought to recover damages occasioned by injuries to property, it is local such as trespass or case for nuisance or waste, etc., to houses, lands, water courses, right of common, wages or other real property: *Id.* 297.

Such is the language of Mr. Chitty, and he adds: "If the land, etc., be out of this Kingdom the plaintiff has no remedy in the English courts." Thus showing that the rule is not governed by the form of action, but by its cause. The rule is stated that the action is local whether it be trespass or case to recover damages for injury to the real property.

Caruthers, in his History of a Law-suit, section 31, says a local action must be brought in the county where the land lies, and that an action for land, *or for injuries to it*, is a local action, and cites 1 Chitty Pl., 268; 1 Rob. Practice, 353. And he adds, this rule not having been repealed by the Code, stands in full force.

In our State there is no distinction between trespass and case, a suit brought in one form may be sustained by evidence of either. And in this case the warrant charges the burning to have been done wilfully and negligently. The property burned was part of the realty: Code, sec. 57.

I am, therefore, of opinion that the court below erred in sustaining the demurrer to the plea in abatement, and the report of the Referees should be set aside, and the judgment below reversed and the cause

remanded for issue and trial upon the plea in abatement. But the majority of the court hold that the report of the Referees is correct and that the judgment should be affirmed, which will be accordingly so entered.

COOKE, Sp. J., concurs in the foregoing dissenting opinion.

GEO. WOOLDRIDGE *et al.* v. A. M. BOYD.

1. WRIT OF ERROR. *Lis pendens.* A writ of error is a new suit and the *lis pendens* under it does not begin until the service of the summons or subpœna.

2. SAME. *Same. Estoppel.* S instituted an action of ejectment against N, which N enjoined; the injunction suit was dismissed on final hearing and the action of ejectment was tried, resulting in a verdict and judgment for S; writ of possession was executed, and N, by written contract, became tenant of S. A transcript of the injunction case was filed in the Supreme Court for writ of error, N being tenant as aforesaid, conveyed to W by quit-claim deed, and S, before notice of the writ of error, conveyed to B. In the Supreme Court the injunction suit was reversed and decree rendered in favor of N. Held, N was estopped from claiming the land and that W stood upon no higher ground than N.

FROM OBION.

Appeal from the Chancery Court at Union City. JOHN SOMERS, Ch.

S. A. D. STEEL for complainants.

W. H. SWIGGART for defendant.

DEADERICK, C. J., delivered the opinion of the court.

In July, 1858, Jasper Sutherland conveyed by deed duly registered to James Sutherland the tract of land in controversy.

In January, 1859, said Jasper conveyed the same parcel of land to one Jones; Jones thereafter sold to Pierce, and Pierce sold and conveyed to W. F. Wooldridge, the ancestor of complainants, and in May, 1865, Wooldridge sold and conveyed said land to one J. A. Norman.

Soon after this last sale the said James Sutherland, who held the older deed from said Jasper Sutherland, instituted an action of ejectment against Norman to recover the land. While this action of ejectment was pending Norman filed his bill in the chancery court, alleging that the deed from Jasper to James Sutherland was fraudulently obtained, and was made without consideration, and that said James had never claimed under it, and obtained an injunction restraining him from further prosecution of said action of ejectment. Upon final hearing in January, 1877, the chancellor dismissed Norman's bill, adjudging cost against him.

At February term, 1877, of the circuit court, the action of ejectment was tried, and resulted in a verdict for plaintiff. A writ of possession issued, and plaintiff, James Sutherland, was put in possession of the land; whereupon on the 5th of March, 1877, said Norman by written contract acknowledged himself the tenant of said James Sutherland, agreeing to surren-

der the possession of said land on the first day of January thereafter.

Defendant, Boyd, as agent of James Sutherland, took this written agreement from the said Norman, and five days thereafter he bought a portion of the land of said James. On April 19, 1877, Norman, then being in possession of said land under said contract of tenancy, conveyed by a quit-claim deed the said land to said Wooldridge his vendor, and Wooldridge repaid him the purchase money.

In May, 1877, the transcript of the injunction case was filed for writ of error, and notice thereof executed on James Sutherland August 27, 1877.

In the meantime James Sutherland conveyed June 11, 1877, the balance of their land to the defendant, Boyd.

These facts appear from the bill, and it is insisted inasmuch as the decree in the injunction case was reversed upon writ of error, and a decree rendered in favor of Norman by this court therein, and that as complainant held Norman's quit-claim deed, he had a right to recover the land, the purchase having been made pending the suit, finally determined in this court upon writ of error, and that A. M. Boyd had notice of the defeasible character of the deed of Jasper to James Sutherland.

On demurrer the bill in this case was dismissed, and complainants who are the heirs-at-law of W. F. Wooldridge, appealed to this court. The Referees in an elaborate and able report of the facts and law of the case, have recommended an affirmance of the chancellor's decree, and complainants have excepted thereto.

It will be remembered that at the termination of the litigation between James Sutherland and Norman, in which the title to the land was the issue, that Norman held the title deed of Wooldridge to the land; Wooldridge having parted with his title to Norman, cannot be said to have had any interest in it.

After this litigation was ended by the judgment and decree of said courts, and by placing said James in the possession of the land, Norman by his contract in writing attorned to him, acknowledged himself the tenant of James Sutherland, and agreed to pay a nominal rent and surrender the possession on the first of January next thereafter, and he was in possession, under this contract, as tenant of said James Sutherland at the time of this execution of the quit-claim deed to Wooldridge.

Boyd knew of this attornment or acknowledgment of tenancy by Norman from himself, and soon thereafter made his first purchase. This purchase was made before the writ of error was sought, and before conveyance by Norman to Wooldridge. The second purchase was made after said conveyance, and after the filing of the transcript for writ of error, but before any notice of its having been filed was given.

It has been frequently said by this court that in law and in fact a writ of error is a new suit. And this is peculiarly true of it in the aspect of the necessity of notice to the adverse party. No steps can be taken against him until he is notified. Until then he is not in court, nor a party to the suit. Being in this sense a new suit, the rule is

that the *lis pendens* begins from the service of the summons or subpœna: 4 Heis., 686, and cases cited.

It is therefore manifest that Boyd was not a purchaser *lis pendens*, as his purchases were made after the rendition of judgment in favor of his vendor, and before notice of a pending writ of error.

Not only were both suits finally decided, but the judgment in the ejectment case had been executed, and the defendant in that case, by becoming the tenant of his successful adversary, disclaimed, in effect, any purpose of further litigation, and led Boyd to believe that the struggle for the title had been settled. Under these facts we are of opinion that Norman was estopped to set up further claim to the land, as Boyd bought upon the faith of its abandonment, and that Wooldridge who took a quit-claim deed from Norman, while he was Sutherland's tenant, and after his title has been lost, stands upon no higher ground than Norman would occupy.

The report of Referees will be confirmed.

C. T. BATES, Adm'r., *v.* JAMES ELROD *et al.*

1. LIMITATION. *Administration Request for delay.* The delay of a creditor at the request of an administrator under the Code, secs. 2280, 2785, does not prevent the running of the general statute of limitations.

2. SAME. *Same. Insolvent estate. Suggestion and advertisement.* It is not the suggestion of insolvency of an estate in the county court, but the suggestion and advertisement thereof under the order of the clerk which operate as an injunction, and constitute the institution of a suit for the administration of the estate, and the best, and perhaps only evidence of the fact, except by consent of parties, is a certified copy of the record.

FROM MADISON.

Appeal from the Chancery Court at Jackson. T. C. MUSE, Ch.

J. L. H. TOMLIN for complainant.

JNO. W. BUFORD and MCCORRY & BOND for defendants.

COOPER, J., delivered the opinion of the court.

Austin W. Elrod died intestate in March, 1875, and on the sixth of the following month, the complainant, C. T. Bates, became the administrator of his estate. On September 13, 1881, this bill was filed against the heirs and creditors of the intestate to administer the estate under the insolvent laws. Such proceedings were had, that, upon a reference, a report

was made on the claims which had been filed by creditors. Among these claims the master allowed against the estate two notes in favor of B. Barr executed by the intestate in 1870 and 1871 respectively, payable one day after date. And the master also allowed several accounts filed by D. H. King, the items of which ran from 1871 to 1875. Exceptions were filed "by the defendants, especially King," to the allowance of the claims of Barr, upon the ground that they were barred by the statutes of limitation of two and a half, six and seven years. The complainant filed exceptions to the allowance of King's claims upon the ground that they were barred by the statutes of two and a half and six years. The chancellor overruled the exceptions of the defendants, and sustained the exception of the complainant. King appealed specially from these rulings. The Referees report that both set of exceptions should be allowed, the claims of each of the creditors being barred by the statute of limitations. The complainant and appellant both except to the report.

The notes of Barr were filed in this cause on December 12, 1881, less than seven years after the death of the intestate, but more than six years after the accrual of the right of action, excluding the time between the death of the intestate and the grant of letters of administration, and the following six months: Code, sec. 2760. There is evidence tending to show that Barr delayed to bring suit at the special request of the administrator. Whether the delay was "for a definite time," so that the time of delay should not

be counted in the period of limitations, under the Code, secs. 2280, 2784, may admit of doubt: *Ricketts* v. *Ricketts*, 4 Lea, 163. Be this as it may, the delay allowed only applies to the limitation of two and three years specially provided for the protection of the estates of decedents: Code, sec. 2785. It has no effect upon the general limitation of six years on notes. The administrator, it is true, need not plead the general statute of limitations: *Brown* v. *Porter*, 7 Hum., 373. But the heirs, or any of them, may plead the statute, and the other creditors may rely upon the plea, even if the personal representatives decline to do so: *Peck* v, *Wheaton*, M. & Y., 353; *Bloom* v. *Cate*, 7 Lea, 472. And therefore it has been properly held that the request of the personal representative for delay of suit does not prevent the bar of the statute of six years: *Loyd* v. *Loyd*, 9 Baxt., 406.

The claims of King were filed in this case on June 26, 1882. *Prima facie*, they were barred by all the statutes. But the creditor contends that his claims were filed in the county court within time, and that the bar was thereby saved. The accounts of King have an endorsement upon them, signed by the administrator, showing that they were presented to him on April 29, 1876; and a further endorsement thus; "Filed April 4, 1877. S. D. Barrett, clerk." And King testifies that the administrator told him to file the claims with the clerk of the county court. Neither the presentation to the administrator, nor the filing with the clerk would of themselves prevent the runing of the statute. The law expressly requires the

commencement of an action within the time prescribed, continuously prosecuted, except in cases falling within the provisions of the Code, sec. 2755, of which this is not one. If, indeed, the suggestion of insolvency be made in the county court, and followed by an order of the clerk on the administrator to make publication for creditors as prescribed by the Code, sec. 2330, and publication be made accordingly, the proceedings would be the institution of a suit in that court for the administration of the estate, and the filing of a claim by any creditor would stop the running of the statute. And a subsequent transfer of the proceedings to the chancery court would carry the claims into that court. But it is the suggestion of insolvency "and advertisement thereof" which operate as an injunction against the bringing of any suit against the administrator thereafter: Code, sec. 2332. No time is fixed by law for the suggestion of the insolvency of the estate, and, if the assets are sufficient to give the court of chancery jurisdiction, the suggestion is generally made on the eve of the filing the bill, and merely as a preliminary form. There is no testimony in this record to show when the suggestion of insolvency was made to the county court in this case, nor that any step was taken thereunder in that court. The best, and perhaps the only evidence, except by consent of parties, of the fact of insolvent proceedings in the county court is the production of a certified copy of ths record. But there is no evidence on the subject in this case. And the claims themselves show an independent filing in the chancery

court, which would have been unnecessary if there had been any transfer of proceedings from the county court to that court.

The report of the Referees must be confirmed, the decree below modified, and the exception to both claims sustained. The costs will be taxed as directed by the Referees.

BELLE TEMPLE *v.* NELSON TEMPLE.

DIVORCE. *Publication. Resident defendant.* The Code, sec. 2456, which allows the petition of a woman for divorce to be heard without service of process or publication, if a subpœna was placed in the hands of the sheriff of the county in which the suit was instituted three months before the time when the subpœna is returnable, only applies when the defendant is a resident of the county in which the suit is brought.

FROM CHESTER.

Appeal from the Chancery Court at Henderson. T. C. MUSE, Ch.

J. M. TROUT for complainant.

—— ——— for defendant.

COOPER, J., delivered the opinion of the court.

Bill for divorce, alleging that the defendant is a non-resident of the State. On the hearing, the chancellor

was of opinion that he had no jurisdiction of the person of the defendant by service of process or publication, and so announced with leave to the complainant to make publication. The complainant refused to take any further step to bring the defendant before the court, insisting that he was already in court. The bill was thereupon dismissed and complainant appealed.

A subpœna to answer had been issued for the defendant upon which the officer returned that he had not found the defendant, after having had the process in his hands for three months. The complainant proceeded under the Code, sec. 2456, which is as follows: "If a woman sue for a divorce, her bill or petition may be heard and a divorce granted without service of the subpœna or publication, if her bill was filed and subpœna for the defendant was placed in the hands of the sheriff of the county in which the suit is instituted three months before the time when the subpœna is returnable; but the officer having the subpœna shall execute it if he can."

The chancellor was of opinion that the statute applied only to cases where the defendant is a resident of the county in which the suit is instituted. This construction is sustained by the language of the last clause of the section which requires the officer to execute the subpœna if he can, fairly implying that the provision was intended to apply when service was possible. By the general law non-residents are made parties in equity by publication: Code, sec. 4352, *et seq.* And by the Code, sec. 2454, it is provided that where a divorce is sought because the defendant is a

convict in the penitentiary, the bill may be taken for confessed upon publication, "as if he were a non-resident," which assumes that non-resident defendants are made parties by publication. We cannot, under these circumstances, infer a legislative intent to depart from the usual course of proceeding as to non-residents without more positive language to that effect.

The decree of the chancellor must therefore be affirmed with costs, but without prejudice to the complainant's right to bring another suit.

Ed. Garvin v. The State.

Constitutional Law. *Keeping a gaming house.* Act of 1883, chapter 230, embraces but one subject and is constitutional. "Etc" at the end and part of the title of an act means "and others," and "and-so-forth," and is not to be rejected. "Such" refers to something which has preceded and means "of that particular character specified." An act may be valid if the intention of the Legislature can be intelligently gathered from the whole act, however awkwardly expressed. The object and purpose of the Constitution in providing that an act shall embrace but one subject, which shall be expressed in the title, is to give notice to the legislator of the subject of legislation, and it is sufficient so long as the subject-matter of the act is germane to that expressed in the title, whether the body enlarges or restricts the title. If a statute admits two constructions, one of which would render it constitutional, and the other unconstitutional, the former should be adopted. And a doubt in relation to its constitutionality should be resolved in favor of the act.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. J. M. Greer, J.

W. H. CARROLL, GEORGE GANTT and J. J. VERTREES for Garvin.

ATTORNEY-GENERAL LEA for the State.

TURNEY, J., delivered the opinion of the court.

There are two counts in the indictment. The first, for keeping a room for the purpose of encouraging, promoting, aiding and assisting the playing of a certain game called "faro," for money. Second, for keeping, exhibiting and operating a certain table for the playing of a game called "faro," for money.

A motion to quash was overruled and the accused pleaded not guilty.

There was a verdict of guilty of keeping a gaming house, fining the prisoner two hundred dollars and imprisoning him one year in the penitentiary. The prisoner appeals. No question is made upon the facts.

The indictment is predicated on the act of the General Assembly of 1883, chapter 230, as follows: "An act to punish as felons all parties who may engage in the keeping or conducting of halls or houses for conduct of *games* of keno, faro, three card monte and mustang," etc.

Section 1, "Be it enacted by the General Assembly of the State of Tennessee, That from and after the passage of this act, any person who shall keep a room, hall or house for the purpose of encouraging or promoting, aiding or assisting in the playing of any game of keno, faro, three card monte, mustang, red and black, high ball, roulette, twenty-one and hazard, or

who shall keep or exhibit such gaming table or operate the same, either as owner or employe, and upon conviction shall be deemed guilty of a felony, and shall be fined not less than two hundred dollars nor more than five hundred dollars, and imprisonment in the State penitentiary not less than one nor more than three years."

Section 2, "Be it further enacted, That the change of name of any of the games enumerated shall not prevent the conviction of any person guilty of violating any of the provisions of this act."

Section 3, "Be it further enacted, That all laws and parts of laws in conflict with this act, be and the same are hereby repealed."

It is objected to the act, that it violates section 17 of Article 2 of the Constitution, which ordains: "No bill shall become a law which contains more than one subject—that subject to be expressed in the title."

To support this position many authorities of our own as well as of sister States, are cited. We have not had access to many of the cases in other States, but their purport is, no doubt, correctly set forth in the printed briefs and arguments furnished by counsel for the accused. While these authorities are all highly respectable, we must, in construing our own organic and statutory laws, observe the interpretations of our courts, if any have been given, the more especially as the language of our Constitution differs from that used in other States.

The question here first came before this court in the case of *Cannon* v. *Matthes*, 8 Heis., 519, in which

Nicholson, C. J., quotes and adopts the language of Judge Cooley, that "the general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object, to be provided for by a separate act relating to that alone, would not only be unreasonable, but would actually render legislation impossible. The generality of a title is no objection to it so long as it is not made a cover to legislation incongruous to itself, and which by no fair intendment can be considered as having a necessary or proper connection. The Legislature must determine for itself how broad and comprehensive shall be the objects of statute, and how much particularity shall be employed in the title in defining it." The Chief Justice adds: "We concur in these general views as sound and practical, and by them the validity of the act in question must be tested."

In the *Cannon-Matthes* case, the title of the act was: "An act to fix the State tax on property." The fourth section of the act increases the tax on all privileges 50 per cent upon the existing basis. The court says: "The first inquiry is, does the act in question embrace more than one subject? As we have seen, the first section provides for raising revenue by a tax on property. The second repeals a former law as to the manner and order of paying out the revenue from the treasury; and the fourth provides for raising revenue by a tax on privileges. The general subject of the act is revenue, and each and every section has a

direct reference to the subject of revenue in its different phases. It cannot be said that there is the least incongruity among the provisions of the four sections. They have a natural, if not a necessary connection with, and dependence upon each other. Revenue is the general subject," etc. "The act is not obnoxious to the objection that it embraces more subjects than one." The Chief Justice concludes: "It is obvious, therefore, that the true rule of the construction, as fully established by the authorities is, that any provision of the act, *directly or indirectly*, relating to the subject expressed in the title and having a natural connection thereto, and not foreign thereto, should be held to be embraced in it." Holding the act constitutional and valid.

In *State* v. *Lasiter*, 9 Baxt., 586, this court, speaking through Judge McFarland, said: "The evil intended to be remedied was to prevent laws upon one subject being tacked on to a bill upon a wholly different subject, and in this way some times elude the attention of the Legislature and pass without sufficient consideration, and when passed often remain for some time undiscovered, by reason that the title of the act fails to call attention to it. This provision of the Constitution is a salutary one and should be rigidly enforced, according to its true spirit and intent, *but not so as to embarrass necessary legislation*. Legislation upon different subjects and upon subjects not indicated in the title of the act are forbidden, but it was not intended that the title should express fully everything contained in it." To the same effect in equally com-

prehensive language in *Home Insurance Company* v. *Taxing District*, is the opinion by Judge Cooper, 4 Lea, 649.

In *State* v. *Bethel*, MS. opinion by Judge Freeman in 1879, the title was: "An act to prevent the wanton and willful killing the stock of another." The first section is in accord with the title. The second section forbids the wanton killing the beast of another of less value than ten dollars, or to cut off the tongue, ear or tail, or put out the eye or otherwise dismember or disfigure or wound any beast of another, or wilfully and knowingly administer poison," etc. This was held violative of the Constitution. I now doubt the correctness of that holding, yet in that case the court said: "As a matter of course all matters fairly incident to the subject mentioned, and necessary to effectuate that end, will be included in the general terms of the title."

Now, if we try the case in hand by the rules referred to, we will find the act questioned directed against gaming houses. If the title had been simply an act to abolish gambling houses, or an act to suppress unlawful gaming, or an act to prohibit games of chance; with the body of the act in the words of this one, we do not suppose that it would be contended the act was upon a subject different to that of the caption, or that it contained more than one subject, viz, gaming houses. The words "hall, room or house," are included in the one word *house*. The terms employed in the act embrace everything necessary to the adoption of the place used for the purposes of gaming.

The implements of the several games mentioned are necessary to make the house used a house for the purpose of encouraging, promoting, aiding or assisting in the playing of games, as is the furniture of a dwelling-house to its occupation as a dwelling. We cannot look upon or into the empty building and determine certainly the object of its erection. When, however, we see it equipped, we can. The furniture indicates the use to be made of the house. We know the store-room by its furniture, the dining-room by its, the bed-room by its, the parlor by its. Neither can be used without its appropriate appointments, and neither is complete without them. It is not a house used for a purpose until means of executing that purpose are provided to it.

The "etc" used at the end and as part of the title, may not be rejected—it has a meaning. Webster defines it "et cætera," "and others," "and so-forth." This definition applied here means, "and the rest of games," or "and other games." It gives to the members of the Legislature notice that the subject of the title is drawn out or elaborated in the body of the act, that the reformatory force of the act is not to be confined to houses or to persons keeping houses for the playing of the four games recited, but is extended to other games. It has a significant and pointed conclusion, which could not escape the attention of any member of the Legislature who had regard to his obligations and duties. It said to him in terms, other games are leveled at besides the four mentioned in the title, and you are invited to look to them. It admonished

him, the act is not made to cover a legislation incongruous in itself. By fair intendment the title had a necessary and proper connection with the act.

The sign "etc" is really more comprehensive than the provisions of the act, giving it the meaning quoted, the title reads: "An act to punish as felons all parties who may engage in the keeping or conducting of halls or houses for conduct of games of keno, faro three card monte, mustang and the rest of games," or "and other games."

It cannot be objected that the title upon the one subject is broader than the act under it. The title notified the Legislature of a thoroughly comprehensive thrust at all parties engaged in conducting gambling houses; the act confines the thrust to parties conducting houses in the playing of nine games. The record shows there are a great many other games which are played everywhere, besides those mentioned in the act, of which, however, we presume the draftsman of the act was uninformed, but which might have been embraced under the title to his act.

So far this opinion is based upon the presentation of the case at the last term. The case was then held up for further argument. It is now insisted the abreviation "etc" has no meaning at all, or at most means, "and for other purposes." Authorities are cited we cannot agree to, either. The abreviation may no longer be called such. It is thoroughly incorporated into our language, is defined by our lexicographers, and is a perfect English word in almost common use.

It cannot mean "and for other purposes," for the

reason that such definitions would include any and all purposes, however foreign to the object of the legislation, one of the inconveniences and inconsistencies intended to be remedied by the present Constitution.

By adopting the definition of Mr. Webster, "and others," we have the title to the act to read in its conclusion three card monte, mustang and others, meaning those named and other games. The word "others" relates to games. Thus explained the title will read, "an act to punish as felons all parties who may engage in the keeping or conducting of halls or houses for conduct of games of keno, faro, three card monte, mustang and other games." This embraces the five additional games specified in the body of the act.

It is contended if "etc" is to have any effective meaning, that meaning must be in this statute, "and other similar or kindred games."

I think we might in this instance admit the restriction, and still the statute will stand. The five additional games in the body of the act are in some essentials as discovered by the record, similar or kindred games to those in the title. The proof shows that of all the games some are played alone with cards, some with balls, some with balls and cards, some with dice and others with dice and cards, and when we come to examine and compare we find that the balls, cards and dice used in the games of the title are the balls, cards, and dice used in the games of the body of the act, each game in the body of the act has an element similar to one in some one of those in the title. To some article of each outfit for the games mentioned in

the title, there is a corresponding article in one or more of the games named in the body of the act, so that we have a similarity or relationship between the games, at least in the means employed if not in the mode of playing. But under the definition of "etc" it is unnecessary to consider the question of similarity or resemblance of either instruments or mode.

It is urged that the body of the act includes another subject not expressed in the title, in this language: "Or who shall keep or exhibit such gaming table or operate the same, either as owner or employe." The objection is made upon what is insisted to be a distinct offense of keeping, exhibiting or operating a gaming table.

At first view there is seeming difficulty of reconciliation, but upon an analysis of the entire act by what is the evident intention of the Legislature, I think that difficulty disappears. The title to the act shows its purpose was to destroy gaming houses. It nor the body aims a penalty or punishment at persons who simply play at the games, but at those who keep or conduct houses, etc., for the conduct of games. If house, room, hall or place had been used instead of "table," there would have been no incongruity. Upon the occurrence of the word "table," which is employed but the one time, there is no incoherency of language and no departure from the subject expressed in the title.

It being our duty in the effort to construe statutes to arrive at the intention of the law-maker, and in doing so to take all the declaration to arrive at the

true intent and meaning, we are of opinion, that on a reading of the section to the word "table" or "such gaming table," it will be clear that reference is had to the house, room or hall in which the games were played or to be played. The language is, "such gaming table." The inquiry is, what gaming table? The answer must come from a construction of the language, and is a table of that particular character specified—a table representing the object as particularized in terms which are not mentioned: Webster's Dictionary.

So that the words "such gaming table" represents something of a particular character that has been specified or described before its use in the after clause of the sentence or paragraph, and is used as an expression of reference to an object or thing clearly described, with the purpose that the reader shall return to that description to ascertain the object referred to or represented. Mr. Webster also defines "such" as "used to represent the object indefinitely, or particularized one way or another, or one and another not there mentioned." As it seems to me, there can be no doubt that we should interpret the words to have the meaning and reference indicated. They either so mean or they mean nothing. We are not authorized to hold they mean or were intended to mean nothing. Give them their legitimate and only meaning and the act will read: "Any person who shall keep a room, hall or house for the purpose of encouraging, or who shall keep or exhibit such or operate the same," etc. We admit the expression of the act is seemingly awkward and not strictly grammatical, but it is a rule as

old as the law itself, that such imperfections do not vitiate. We know of no such rule which requires a legislatuor to be learned in the rules of composition, language or grammar, or if he is, that he shall overlook the work of the copying or engrossing clerk.

It is sufficient if the intention can be intelligently gathered from the act as a whole, whatever its phraseology may be. It appears in proof that many of the games may be played without tables, while it is customary to have them.

In Desty's Am. Crim. Law, section 102*b*, it is said: "Setting up a gaming table consists in providing the essentials of the game, and a table in the literal sense need not exist, nor money or property be staked, but credit may be substituted, yet a game must be played and something bet." If this law is sound, and the proof shows it is, a gaming table is any place convenient for and in which the game may be played.

If "*setting up a gaming table consists in providing the essentials,*" and a real table is not necessary, then the room, the hall, the house or other place used for gaming purposes, is one of the *indispensable* "*essentials*" of a gaming table, and taken in connection with the games mentioned in the statute constitute the "such gaming table" mentioned in the act. To prohibit the setting up a gaming table as defined by Mr. Desty, interpreting the statute by the proof and the law cited, the draftsman employed the strictly correct term to express the object of both title and body of the act. A house, etc., could not be kept for the conduct of the prohibited games unless the tools of the games were also

kept. A house, hall or room kept for a purpose must be supplied with the materials for that purpose. As already intimated all these things combined constitute a gaming table, or gaming house, the terms are synonomous in gaming vernacular. Keeping, exhibiting or operating a gaming table is the "setting up of a gaming table, the keeping, operating and exhibiting a gaming house." Such is the clear and unmistakable meaning of the Legislature. Seeing that meaning we must define the words employed by it. The language is to be understood by its relation to its several parts. In no other way can we arrive at the intention and meaning of the author.

As the object and purpose of the Constitution was and is to give to legislators notice of the subject of legislation upon which they are required to vote, and thereby prevent the passage of laws tacked on to the original act for wholly different and foreign purposes, it would seem that so long as the subject-matter of the body of the act is germane to that expressed in the title, there is an obedience to the mandate of the Constitution, whether the body enlarges or restricts the title. The subject-matter being houses kept for the conduct of games, must of necessity be construed to embrace all places and conveniences whatever in and by which games are to be conducted, or which may be set apart for the conduct of games. Whether such place be in reality a house or tent, cave, tree or open space in a lot or field, or the conveniences be real tables, cards, balls, etc., upon the principle upon which it was held under the old statutes against tippling,

that any place designated by the tippler as a drinking place became his premises in the eye of the law, however disconnected from the house in which he kept and sold.

If we can clearly see from the title that the intention of the Legislature was to destroy gambling and gaming houses, and that therefor the act was pointed at the proprietors of such houses, and nothing foreign is introduced, the title and body are consistent with the Constitution and must stand as the law.

There is nothing in the ordinance from which we may conclude the framers of the Constitution meant to restrict legislation to any sub-division of a subject inartificially expressed in the title of an act. To confine to one subject is the end aimed at, and if the title will call attention to all that may be expressed under the subject, it is sufficient. Games and gaming houses being the subject expressed in the title before us, it could not possibly fail to advertise the legislator of every thing pertaining to games and gaming houses.

That the Legislature did not mean and the title could not be understood to embrace only the games specified, it is observable that the comprehensive term 'games" and not the restrictive one, "the games" is used in the title—the title being * * * for conduct of *games* of keno, etc. This of itself gave notice that the specifications of the body were to be more comprehensive than the title.

We are of opinion that the intention of the Legislature is sufficiently expressed in the title, that the body is conformable to that title and that both consist with the Constitution.

To hold that the many objections made to the form and phraseology of the act are well taken, would be to declare that a legislator must familiarize himself with the terms of a vice, its apparatus and uses before he can draft a law for its prohibition or regulation. When the legislative will is expressed upon a matter within legislative control, the courts have no election but to obey.

This being a positive statute creating a new offense, it repeals by implication all former laws creating different offenses for the same causes. Affirmed.

FREEMAN, J., dissents.

Upon petition to rehear COOPER, J., said:

The statute under consideration in this case is very inartificially drawn, so much so as to leave an opening for the able and elaborate arguments which have been submitted against its constitutionality. It is our duty, however, to try to ascertain the intention of the Legislature, and effectuate that intention if possible. Every intendment is in favor of the constitutionality of a statute. If a statute admits of two constructions, one of which would render it constitutional and the other unconstitutional, the former construction should be adopted. And a doubt in relation to its constitutionality must be resolved in favor of the State.

The argument against the validity of this statute rests entirely upon the assumption that the body of the act creates several felonies, while the title only expresses one, namely, to "engage in the keeping and

conducting of halls or houses for conduct of games," naming three notorious gambling games, and concluding with "etc.," the abbreviation of a word whose comprehensiveness was dwelt upon by Lord Coke. Unquestionably, the offense meant by the Legislature was the keeping of a place for the conduct of gambling games, and the enumeration of some of these games in the title, when followed by a word plainly expressive of the fact that other games were also intended, would sufficiently express the enumeration in the body of the act of all the games intended to be covered thereby. In this view, the body of the act down to the end of the enumeration of the games is in accord with the caption. For, "to keep a room, hall or house for the purpose of encouraging or promoting, aiding or assisting the playing" of games mentioned is only an amplified mode of expressing the subject of the title. Then follow the words, "or who shall keep or exhibit such gaming table, or operate the same either as owner or employe." And it may be argued, and is argued that these words create the separate offenses of keeping or exhibiting a gaming table, and operating such table either as owner or employe. But may they not also mean, and is not that the true meaning, when we read the clause as part of an entire paragraph, that the gaming table kept or operated is only "such gaming table" as is used in the conduct of the named games in the place kept for gaming, and that any person, either owner or employe, who keeps or conducts the particular place for the "conduct" or carrying on of the specified gambling games, will be guilty of the

offense? The title is an act to punish "all parties" who may run the place. The owner is of course included, but so is the employe if the owner chooses to stand back and employ another. Read in this way, the subject is one, and expressed in the title.

Petition for rehearing dismissed.

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STATE v. WILLIAM HARGROVE.

1. CRIMINAL LAW. *Oath of jury.* Where in the entry reciting the swearing of the jury when empanelled, the oath is, "who being elected, tried and sworn to well and truly try the issue joined," and in the entry containing the verdict after giving the names of the jurymens it is recited, "who being duly empanelled, elected, sworn and charged, well and truly to try the issues joined in this case, and the truth to speak, and a true deliverance on their oaths do say," etc. *Held*, that if the first recital is defective the latter cures it.

2. SAME. *Charge of court.* While it is proper when requested, for the circuit and criminal judges to charge all the grades of offense involved in the indictment, and reprehensible for them to refuse to charge, yet when the Supreme Court can see that the prisoner has not been injured by the failure to charge on all the grades of crime involved in the indictment, a new trial will not be granted.

FROM BENTON.

Appeal in error from the Criminal Court of Benton county. C. ADEN, J.

—— ——— FARMER for Hargrove.

ATTORNEY-GENERAL LEA for the State.

FREEMAN, J., delivered the opinion of the court.

The defendant was indicted for killing Alfred Register on November 24, 1881, by shooting him with a pistol. He plead not guilty, and was convicted by a jury of murder in the first degree, the jury finding, however, mitigating circumstances, and the court acting on this, he was sentenced to imprisonment in the penitentiary for life. He has appealed in error to this court.

Several errors are assigned. The material ones we proceed to dispose of.

Objection is taken to the form of the oath administered to the jury. In the entry reciting the swearing of the jury, when empanneled, the oath is: "who being elected, tried and sworn to well and truly try the issue joined." But we find in the entry containing the verdict, after giving the names of the jurymen, it is recited, "who having been duly empanneled, elected, sworn and charged well and truly to try the issues joined in this cause, and the truth to speak, and a true deliverance on their oaths do say," etc. If the first recital was defective, the latter recital is full enough to cure the supposed defect. The latter entry is as much a part of the record as the first, and has the same verity, the whole record must be taken to show correctly the history of what occurred on the trial.

The evidence unquestionably sustains the verdict of the jury as to the killing and degree of guilt. It may well be doubted whether there is any thing on

which to base the finding "of mitigating circumstances," unless it be the fact that the defendant was but a youth, probably not more than seventeen years of age at the time.

The facts are, that deceased, who was a brother-in-law of defendant, lived at the house of his father-in-law, or was staying there with his family, in Carroll county. The day before the killing they started to Benton county to rent land. They returned through Camden, the county seat of Benton, on their way home, and about three miles west of that place they seemed to have turned out of the main road, along a blind path that led to the top of a hill, the top being the head of a hollow descending the opposite way from the main road, to feed their mules, each riding one of these animals. The path gave out at top of the hill, the parties went over the top of the hill, as far down the descent as they could well get, stopped, fed the mules on fodder, and evidently had lain down behind the shelter of the hill to rest while the mules fed, the day being a cold one. The testimony would show that the deceased was lying with his feet down the hill, his hat on, a handkerchief partly over his lower face, and around his neck, and probably asleep. The defendant, from the print of his body on the leaves, had laid down by his side, within reach of him, with his head a little higher up the hill than deceased, his body angling from him. In this position he evidently shot the deceased on the top of the head, a little to the right of the center of the head, and a little back from the top; the ball,

says the physician who examined the body, and got it out, ranging a little to the right—the prisoner being to the left of Register. That this is the history of the transaction there can be no doubt. The place was a most retired one; there was no sign of a struggle, nor in fact, as we think, of any violence on the body, except the pistol shot. The deceased was found a few minutes afterwards lying in the position indicated, his feet crossed, his hat partly on his head, a pistol ball through it, going into his head, his right hand in his pocket, his left extended by his side. He evidently had not moved after the shot.

The two parties who found him, had gone out to hunt sheep, were in the road about 150 yards from the place when the shot was fired. They supposed it was some neighbor hunting, and turned out of the road, and went in direction of the sound, and when they got in twenty or thirty steps of the place defendant was seen near the body, the mules with bits out of their mouths hitched to trees hard by. They asked where his game was? He said his brother-in-law had shot himself; that he was very sorry; he would get whisky in Camden; and that he was going to get a wagon to carry the body on, moving in a hurry to the mules, fixing the bridles, then leading them on towards the road, the two men following and talking to him. He was told Mrs. Watkins lived at next house, about three-fourths of a mile, and had wagon and team he could get. He mounted one mule, drove the other before him, started down the road, going towards home, increasing his speed until he got

into a gallop, and so went out of sight. The parties followed, and found he had not stopped at Watkins nor at next house. He was pursued, found not to be at his father's after night, but was arrested at Huntingdon, Carroll county, that night, a ticket having been procured for Union City, one having been bought for some point in Missouri. He got on the train secretly, after it was in motion, getting into baggage car.

From this summary, it is clear, there is no room for the theory that the case is one where the killing alone is proven, with a deadly weapon, but nothing shown as to the circumstances, in which case the verdict should have been only murder in the second degree, there being no evidence of premeditation and deliberation, the essential elements of the first degree.

The facts show beyond question the murder was done deliberately, and the shot fired with the certain intent it should produce death. The position of the dead man shows there was no altercation, as he lay in an attitude of repose. He was unarmed when found. It is shown by the statement of the prisoner, when he was arrested, that the wound was inflicted by a pistol, not a short one, for prisoner had one of that kind on when arrested, and on being arrested, and on being asked if that was the pistol the man was killed with, said no, it was a longer one. It is almost, if not quite, physically impossible that the party could have shot himself even with a short pistol, lying as he was, as he was shot. The right hand, with which he would have shot, was in his

pocket; it would have been still more difficult with the left hand, unless he was left handed, which is not shown, and besides that hand was extended by his side. The hat being on his head would add to the difficulty of his shooting himself. Other reasons might be given, but this suffices to show that what we have assumed as the facts of the transaction is beyond question.

Evidence is introduced from the sisters and members of the family tending to show several previous threats to kill defendant on the part of deceased. These come in a very questionable shape, and some are incredible. For instance, one sister, Jane Hargrove, swears he got his pistol the morning they started to Benton county, and said he "intended to kill prisoner before he come back, and go to Utah." She says, on cross-examination, that her brother was in the house at the time, and she never told him of it. This is incredible, that a sister, a woman of twenty four years of age, should hear such a threat, and see her young brother start off under such circumstances, and not warn him of his danger. We don't believe it, as the jury evidently have not.

Mary Register, the widow of deceased, and another sister, proved similar threats, and that her husband prevented her telling her brother. It was then proposed to prove that when she spoke of telling him, her husband knocked her down, kicked and abused her, pulling her hair. These acts of violence were not permitted to go to the jury, and exception taken to refusal. While it might not have been error to

have permitted them, we do not think there is any reversible error in refusing to do so. The fact that he prevented her telling was admitted; violence done to his wife because she had proposed to tell her brother would not have served to add any thing to the force of the fact in this case. We may add, we think it incredible that such thing occurred at all.

Numerous requests were presented by the defendant's counsel, and court asked to give them to the jury. All were so given except the first and fourth. The fourth was on the subject of reasonable doubt, which the court declined, because sufficiently stated in main charge. In this he was correct.

The first was a request that the court should charge as to the offense of manslaughter, giving the definitions of this offense in both its grades. The court said: "The proposition is technically correct, but I decline to charge the offense of voluntary manslaughter asked, because the court is of the opinion the facts in the case do not raise that proposition of law, and for that reason decline to instruct the jury that the proposition is the law of the case."

If the rule, as stated by the learned judge delivering the opinion of the court in the case of *Good* v. *The State*, 1 Lea, 294, be held applicable to this case, his Honor was correct.

A majority of the court are of opinion the rule referred to is one that ought to be adhered to by this court, and where the court can see the prisoner has not been legally injured by the failure to charge on all the grades of crime involved in the indictment, that such failure is not reversible error. This is the

principle of the *Good* case. It is, however, as the court holds proper, when requested, that circuit and criminal judges should so charge, and the practice of refusing on the part of such judges is reprehended. It is easily done, and if the facts do not make out a case of lower grade of crime, under clear and proper instructions by the court, no harm is likely to result from what in such a case would be a mere abstract statement of a definition of the other grades of offense included in the indictment.

I am compelled to differ with my brother judges on the last point, deeming the act of 1877 imperative. The result is the judgment is affirmed.

FREEMAN, J., delivered the following dissenting opinion:

I am unable to assent to the views expressed in the case of *Good* v. *State*, or apply them in this case, though I concede, if the law was not clear that requires the opposite, this would be a proper case for its application. My reasons are shortly as follows:

Before the passage of the act of 1877, ch. 85, sec. 1, the rule had been settled by the court in more than one case, that the law must be charged in a case of homicide, on all the grades involved in the indictment.

In the case of *Poole & Mahaffey* v. *The State*, 2 Baxt., 294–5, Judge Turney delivering the opinion of the court: "It is also the duty of the court to define in his charge all the offenses included in the

indictment for this crime. The jury is the exclusive judge of the facts, the court is a witness to it of the law. When the jury has heard the facts it is for it to say what offense, if any, has been committed against the law. However plain it may be to the mind of the court, that one certain offense has been committed and none other, he must not confine himself in his charge to that offense. However clear it may be, the court should never decide the facts, but must leave them unembarrassed to the jury."

He then goes on to explain the qualification of the rule, that is, the court is to charge "on the case made by the facts," and that this only applies to incidental questions arising on the trial, and says it was never meant that the court "should be excused from defining the offenses averred or embraced in the indictment."

The same rule was laid down by Judge McFarland in *Little's* case, 6 Baxt., 494. He says: "We think the judge erred in declining to instruct the jury as to the law of manslaughter, the record shows the judge told the jury that he intentionally omitted to charge them upon this question. We have held this error, after full consideration, in recent cases. This is in effect to tell the jury that if the prisoner is guilty at all, in the opinion of the court, his crime cannot fall below murder in the second degree. We think this invading the province of the jury." Citing *Poole & Mahaffey* v. *The State.*

This might not have been the better rule, but we so held. There had been, probably, some variation

in the strict application of the rule, though I remember none, but it was, I know, most earnestly combatted by Attorney-General Heiskell. In 1877 the Legislature passed the act of 1877, as follows: "Be it enacted by the general assembly of the State of Tennessee, that it shall be the duty of all the judges of the State charging juries in cases of criminal prosecutions for any felony, wherein two or more grades or classes of offense may be included in the indictment, to charge the jury as to all of the law of each offense included in the indictment without any request on the part of the defendant so to do."

It is clear, as I think, the intent was to extend the rule to all cases of felony, the court not having applied it except in cases of homicide as in the cases cited. Be this as it may, the law is the mandate of the Legislature, and imperative. I might concede the rule had been carried too far by our decisions cited, which were made before the act of 1877, and be ready to qualify them in a clear case like the present. But I cannot qualify the mandate of the Legislature in terms so plain as not to be misunderstood. It is the judges "shall charge" in such "cases as to *all* of the law of *each* offense included in the indictment without any request on the part of the defendant so to do."

The rule given in *Good's* case is, that the charge shall be only as to the law as raised, in the judgment of the court by the *facts* on the evidence you have, but to state the two propositions to see that one is the opposite of the other. I would be willing to modify the rule as laid down by this court, because

I think we could safely apply it in proper cases where we could see the prisoner had been injured by failure of the judge to charge the law as applicable to his case. But I cannot modify a statute of the State. It is an unbending thing, and if in accord with the Constitution imperative, and admits of no evasion.

The *Good* case on its facts may not be a very great departure from the statute, as the indictment was for robbery, the bill of exceptions not containing the evidence, but an "agreement conceding the evidence was amply sufficient to warrant the jury in finding the prisoner guilty of the aggravated robbery as charged." The appeal was taken solely to reverse, because notwithstanding this, the court had failed to charge as to the offense of an attempt to commit a robbery. Let the case stand, if need be, for precisely such a case, as was then before the court, but to go any further is to repeal the statute of the Legislature. If the law in cases of homicide was as stated before the Legislature made it imperative and extended it to all felonies, I can see no reason why the rule shall be changed because the Legislature has so enacted.

Whatever we may think of the practicability of the rule, it is certainly in accord with the theory of our Constitution and law, that the judge decides the law, the jury the facts, as said by Judges McFarland and Turney in the opinions I have cited, "no matter how clear this may have been to the judge, it was a question for the jury. If he could decide this in one case,

he could in all cases." I confess it is difficult to find an answer to the meaning. Be this as it may, there is certainly none to the word of the statute, and by this I am bound. If bad policy, the remedy is for the Legislature, not this court.

For these reasons I think the rule in the *Good* case is not the law, and certainly should not be applied to a case of homicide, nor should the judges be allowed to refuse to obey the statute of 1877.

ROBERT H. HESTER *et al. v.* CHARLOTTE HESTER *et al.*

1. DEED OF GIFT. *Evidence. Burden of proof.* Where a person claims by deed of gift from one greatly enfeebled in body and mind, the burden of proof is on him to some extent, not clearly defined, to show that he had no voice in the transaction, or if he had, that his action was free from fault, or that the donor had the benefit of a full consultation with some disinterested third person.

2. SAME. *Mortgage. Equity of redemption.* A grantor may, by a mortgage or trust deed made to secure a debt, convey to the creditor, by voluntary gift, the equity of redemption if the land be not redeemed during life, the beneficiary, by reason of relationship or otherwise, being clearly shown to be an object of the grantor's bounty.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W. W. MCDOWELL, Ch.

HARRIS & TURLEY and W. M. RANDOLPH for complainants.

TAYLOR & CARROLL for defendants.

COOPER, J., delivered the opinion of the court.

Bill by the heirs of John B. Hester, who had died intestate, being the two brothers and a nephew of the deceased, against Charlotte Hester, the intestate's widow, and Dora Sovy, a daughter of Charlotte by a former husband, to set aside a deed of gift of a lot in Memphis made by the intestate to his wife, and a deed of trust of an adjoining lot made by the intestate to a trustee to secure a debt due to Dora Sovy. The chancellor set aside the deed to the wife, and allowed the complainants to redeem the other lot. The Referees have reported that the decree should be affirmed. The widow and her daughter have excepted to the report.

The intestate's estate is insolvent, the two lots in controversy being the only property of which the intestate died possessed. Hester was a ship carpenter, and at one time was in partnership with a man by the name of Sovy. He then owned the lots in question, lived on one of them, and rented part of his house to his partner. Sovy died in 1855, leaving a widow, the defendant, Charlotte, and two daughters, the defendant, Dora, being the oldest, and then about two years of age. The widow and children continued to live in the same house with intestate. The youngest daughter married the defendant, W. B. Hood. The oldest daughter continued to have a room in the house, but seems to have spent much of her time after she grew to womanhood at New Orleans, St. Louis, and

other places. During the last years of his life, Hester, the intestate, seems to have become a hard drinker. He appears to have had a sunstroke in 1877, a paralytic attack and the yellow fever in 1878, took to his bed in May, 1879, and died about the middle of August of that year. On May 8, 1879, he was married to the defendant, Charlotte, the marriage license having been obtained by Hood, the wife's son-in-law, because, as he testifies, the intestate was then in bed, and unable to go for it himself. On June 21st thereafter, the deed of gift of the lot to his wife was executed, the intestate being at that time so feeble, according to the testimony of the attesting witnesses, that he could only speak in a whisper so low that what he said could only be heard by putting the ear close to his mouth.

The testimony is conflicting, and utterly irreconcilable, as to the extent of the failure of the mental faculties of the intestate during his last illness, and for several months before. That there was a gradual waning of his faculties is certain, and it is probable, as one or two of the medical witnesses testify, that for a year or two he had been suffering from a gradual softening of the brain. But it is proved that he served as a juror in the criminal court for several weeks during the months of December, 1878, and January, 1879, that he had some legal business with a lawyer in April, 1879, which he conducted in such a manner as to satisfy the lawyer that he fully comprehended it, and was entirely sound of mind, and that the lawyer who drew the deed of gift to the wife,

a different person, and the intestate's regular lawyer for years, and who visited him twice on the subject at an interval of a few days, was thoroughly satisfied of his mental capacity notwithstanding his bodily feebleness. There was undoubtedly great weakness of body and mind for two or three months before his death, which left the intestate with little independent will, and that will easily influenced. There was clearly no imbecility or actual want of capacity until within a week or two of his final dissolution. The rules of equity in such cases throws upon a person claiming by gift the burden of proof to some extent, not readily determined by definite lines, to show that the act was free and not procured by improper influence, and a degree of weakness far below that which would justify a commission of lunacy, coupled with other circumstances, to show that the weakness had been taken advantage of, would be sufficient to set aside the deed. The question is one of fact, and all that can ordinarily be asked of a beneficiary is to shew that he had no voice in the transaction, or if he had, that his action was free from fault, or that the donor had the benefit of a full consultation with some disinterested third person: 2 Lead. Cas. Eq., 1275. It does appear that the intestate had the latter advantage with an intelligent and disinterested person, his own lawyer, who explained to him the difference between a deed and will, and urged him to make the latter instrument. The intestate, after consideration, persisted in making a disposition of the property by deed. On the one hand it may

be said that this persistence was due to sinister influences, and on the other that the intestate, conscious of speedy dissolution, might naturally desire to give all his property, while life remained, to his wife and her daughter. with whom he had so long lived. There is evidence, although rather of a doubtful character, the testimony of a colored nurse and of the two brothers of the intestate, that the latter desired to have a private interview with his brother, which was prevented by the wife. Under these circumstances I was inclined to concur with the chancellor and the Referees in thinking that the wife had failed to satisfactorily meet the requirements of the law, and that the deed should be set aside. But my brother judges are of a different opinion, and think that the intestate knew what he wanted, and with proper disinterested advice, freely and voluntarily caused the deed of gift to be drafted, and executed it.

The proof is clear that in April, 1875, the lot on which the intestate lived was levied upon, and sold under an execution against him, and that in March, 1877, he borrowed from the defendant, Dora Sovy, $400, with which to redeem the property. To secure her, he conveyed the lot in trust to the defendant, Hood, to secure his note at one year in favor of Dora Sovy for the money thus borrowed, with interest. This deed was executed on March 31, 1877, and authorized the trustee, in case of default of payment, to sell the lot for cash, on ten days' notice in a Memphis newspaper, free from the equity of redemption. The deed also contained this clause: "It

is further agreed and understood that should I die before the debt herein secured is fully paid, Miss Dora Sovy shall have the right, if she chooses, to become the absolute owner of the property herein conveyed at the price of the amount of said note, and interest due thereon, and by surrendering said note to my personal representative, the absolute title to the land shall vest in her immediately." The lawyer who drafted the deed, testified that this was inserted by the direction of the intestate, who said he desired it to be done because Dora had grown up at his house, and that if he died without paying the money he would rather she should have it than any body else. She did elect to take the property, surrendering the note to an administrator appointed for that purpose, and the trustee executing to her a quit-claim deed.

At the time this deed was executed, the testimony leaves no doubt of the competency of the grantor to make it, and that the transaction was exactly what it purported to be. The instrument was not intended to be a will, and cannot take effect as a will because it is not in the handwriting of the grantor, nor attested by witnesses. It conveys specific property for a specific purpose, retaining the right to redeem during life. The conveyance of particular property and the actual delivery of the instrument as a deed fixes its character: *Caines* v. *Marley*, 2 Yer., 582; *Cains* v. *Jones*, 5 Yer., 250; *Watkins* v. *Dean*, 10 Yer., 321; *Fry* v. *Taylor*, 1 Head, 594, 600; *Swails* v. *Bushart*, 2 Head, 561. And the question is whether as a deed it is effective for the purpose expressed on its face.

There can be no doubt of the general rule, in Lord Nottingham's expressive phrase, "once a mortgage, always a mortgage" for purposes of redemption: *Newcomb* v. *Bonham*, 1 Vern., 7; *Cherry* v. *Bowen*, 4 Sneed, 415. But the decision in the case in which this language was used was reversed, on bill of review, by the succeeding Lord Chancellor in 1 Vern., 232. The case was this, the grantor made an absolute conveyance of land to Bonham, but by another deed of the same date the land was made redeemable upon payment of £1,000, and interest, at any time during the life of the grantor; and in case the land should not be redeemed in his life time, then he covenanted that the same should never be redeemed. He died without redeeming, and the heir of the grantor exhibited his bill to have a redemption. It was in proof that the mortgagor had a kindness for the mortgagee, as being his near relation, and did intend him the land after his death. Lord Keeper North, upon the hearing of the bill of review, conceding the general rule, was of opinion that *modus et conventio vincunt legem*, and said: "That where there is a condition or covenant that is good and binding in law, equity will not take it away": 1 Vern., 215. He held that there should be no redemption, "principally," he said, "because it was proved that the intent and design of the mortgagor was to make a settlement by the mortgage, and that he intended a kindness and benefit to the mortgagee in case he should not think fit to redeem the estate in his lifetime": 1 Vern., 232. In the leading case of *Howard* v. *Harris*, 1

Vern., 190, the mortgage contained a covenant that no one but the mortgagor or the heirs male of his body, should be admitted to redeem. The mortgagor died without redeeming and without heirs male of the body. Both Lord Nottingham and Lord Keeper North concurred in holding that the land might nevertheless be redeemed upon the general rule that an attempt to fetter the right of redemption would be unavailing. But the latter said: "If the case had been that a man had borrowed money of his brother, and had agreed to make him a mortgage, and that, if he had no issue male, his brother should have the land, such an agreement made out by proof might well be decreed in equity." The English editors of the Leading Cases in Equity, in their notes on this case, say: "Another exception or qualification of the rule is to be found in that class of cases where the conveyance of an estate to a person by way of mortgage is intended to be in the nature of a family settlement; further it seems, if the right of redemption is confined to the life of the mortgagor, his heirs will not be allowed to redeem": 2 Lead. Cas. Eq., 1051, citing Bonham against Newcomb, and other cases. The law is also so stated in Jones on Mort., sec. 1041. And in this State it has long been provided by statute that the equity of redemption may be waived by contract. Occupying the relation he did to the beneficiary in the trust deed, who had been raised by him, the intestate manifestly intended to make her a gift of the equity of redemption in the event of his death without redeeming, and we see no reason why he should

not be entitled to do so. It was his own voluntary act without any suggestion from the beneficiary.

The exceptions to the report of the Referees will be sustained, the decree of the chancellor reversed, and a decree rendered here in favor of the defendants, and the bill dismissed with costs.

J. J. KNOX, Com'r, *v.* R. H. McCAIN *et al.*

1. LIEN. *Vendor.* A payment by the maker of notes secured by an express vendor's lien, which notes a sub-vendee has agreed to pay in part consideration of his purchase, will not extinguish the lien.

2. MORTGAGE. *Courts should enforce the contract.* If a mortgage or trust deed made to secure a debt expressly stipulate for a sale of the property, in case of default in payment, free from the equity of redemption, it is the duty of the court, in the absence of some controlling equity, to enforce the contract.

FROM SHEBY.

Appeal from the Chancery Court at Memphis. W. W. McDOWELL, Ch.

W. M. RANDOLPH for complainant.

T. F. CASSELS for defendants.

COOPER, J., delivered the opinion of the court.

Bill to sell land under a trust deed to secure the complainant's debt. The principal question raised by the

exceptions of the complainant to the report of the Referees is upon the prior right of the defendant, Minerva J. Owens, to be first paid out of the proceeds of sale. The debt of the complainant was against McCain, who had executed the deed of trust. But McCain held title under a deed from the defendant, Owens. This deed recited that the land was sold and conveyed by Owens to McCain in consideration of $303.41, cash paid, and for the further consideration of the assumption by McCain, and his agreement to pay the one-half of two notes described, being notes for unpaid purchase money due from Owens to her vendor, and secured by a trust assignment of the land. The deed from Owens to McCain expressly retained a lien upon the land to "secure the payment of one-half of the above described notes." The bill itself set out these facts, and made Owens a defendant in order that she might "be required to set up any claim she may have." She did set up her claim by her answer, stating and proving that McCain had paid no part of said notes, and that she had herself been compelled to, and had paid them. The chancellor was of opinion that the payment by Owens had extinguished the notes, and her lien was gone. The Referees reported that the decree upon this point should be reversed. We concur with the Referees. A vendor who sells land in consideration of the vendee's assuming and paying a prior lien debt on the land becomes in equity the surety of the vendee, the latter, as between them, being the principal debtor, and may enforce rights accordingly:

Snyder v. *Summers*, 1 Lea, 534. Being legally compellable to pay the debt, the vendor might pay it voluntarily without affecting the equitable right: *McNeilly* v. *Cooksey*, 2 Lea, 40.

The exception that the debt was barred by the statute of limitations is not well taken, for no such defense is made either by McCain, the debtor, or the complainant. And the possession of both being in subordination to the lien, the statute has never begun to run: *Gudger* v. *Barnes*, 4 Heisk., 570.

The third exception is, however, well taken. The trust deed of the complainant expressly provides that in case of default the land shall be sold for cash, free from the equity of redemption. The Referees direct the sale to be made on time, and there is a decision of this court sanctioning such a decree in a similar case: *Frierson* v. *Blanton*, 1 Baxt., 272. But this decision has been repeatedly overruled in unreported cases, upon the obvious ground that the contract is authorized by statute and that the obligation thereof cannot be interfered with in the absence of some controlling equity. The costs of this court were rightly adjudged, the defendant, Owens, having by her appeal reversed the chancellor's decree.

Exceptions disallowed and report confirmed, with the modification that the sale shall be for cash.

T. I. WEBB *v.* C. H. JONES.

CHANCERY JURISDICTION. A creditor cannot by proceeding in chancery (upon a *nulla bona* return), reach and compel a debtor to appropriate money he has obtained by mortgage and which he has in his possession, to the payment of his debt. This case distinguished from *Cresswell* v. *Smith*, 8 Lea, 688.

FROM HAYWOOD.

Appeal from the Chancery Court at Brownsville. W. W. MCDOWELL, Ch., presiding by interchange.

The bill in this case alleged that complainant had recovered a judgment against the defendant before a justice of the peace, and had execution issued on same which was returned *nulla bona*, and that the defendant had recently mortgaged certain property by which he had obtained $2,000 in money, which he had in his possession, and that he was concealing same to prevent execution being levied on it, and prayed that defendant be enjoined from disposing of same, and be required to discover, and compelled by contempt proceedings, to appropriate same or enough thereof to the payment of complainant's claim and costs, and for personal decree against defendant.

MOORE & BOND for complainant.

BOND & RUTLEDGE for defendant.

FREEMAN, J., delivered the opinion of the court.

This case was placed on the easy docket for an

affirmance some weeks since. On consideration the court concluded it was a proper case for reversal of the chancellor, that the demurrer should have been sustained, and the bill dismissed, and so adjudged.

An earnest petition for rehearing is now presented. We see nothing in it, however, but what was pre-presented in brief of complainant's counsel before, nor any thing to change our opinion.

It is simply a bill by a creditor proposing, by proceedings in a court of chancery, to reach and compel a debtor to appropriate $2000 of money he has obtained in a mortgage, and which is in his possession, to the payment of his debt. It is filed, as argued on the assumption, that the case of *Creswell* v. *Smith*, 8 Lea, 688, authorized the relief sought. But in the concluding part of the opinion, page 702, it will be seen that Judge McFarland expressly says: "We are not to be understood as intimating that a bill might or might not be maintained to compel a defendant to discover whether he has money to pay his debt." That is this case, and the question was pretermitted, and not then decided.

At last term at Knoxville, in a case not yet reported, we held such a bill could not be maintained. Having settled the question, we thought it useless to allow this litigation to go on at expense and trouble, be decided ultimately on proof, and then come back to this court, to have the bill then dismissed on the demurrer, and so determined to end the litigation at this point. We think our conclusion was correct, and dismiss the petition for rehearing, so far as the ques-

tion above stated is concerned. But on looking to the prayer of the bill, we find complainant has prayed for a decree in this case for the amount of his judgment before the magistrate. He is entitled to this. The decree below will therefore be reversed, a decree rendered, dismissing the bill as to the relief sought against the $2000 sought to be impounded, and remanding the case for answer or further proceedings as to the right to have decree for the judgment before the magistrate. Costs of this court be paid by complainant, the cost of the court below to be adjudged by chancellor.

R. G. DUN & Co. *v.* HUGH B. CULLEN, Clerk.

TAX. *Privilege. Commercial agency.* The conducting of a commercial agency is created a privilege, and taxable as such in each county in which an office is kept, by the act of 1883, chapter 106, section 4.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

T. B. EDGINGTON and LUKE E. WRIGHT for Dun & Co.

ATTORNEY-GENERAL LEA and R. D. JORDAN for Clerk.

COOPER, J., delivered the opinion of the court.

The plaintiffs are the proprietors of a commercial agency, having one office in the city of Nashville, and another in the Taxing District of Shelby county. They have paid for the office at Nashville a State tax of $100 for the privilege of keeping a commercial agency from April 1, 1883, to April 1, 1884. The defendant is the county court clerk of Shelby county, and as such required to collect the State and county privilege taxes. He caused a distress warrant to issue against the plaintiffs for the sum of $100 State tax, and the further sum of $100 county tax for the privilege of keeping a commercial agency in Shelby county. The plaintiffs paid to the defendant as clerk the taxes claimed under protest, and brought this suit to recover back the money. The circuit judge tried the case upon an agreed statement of facts, and being of opinion that the plaintiffs were liable for the county tax, but not for the State tax because they had already paid one tax to the State, rendered judgment accordingly. From the judgment thus rendered, both parties have appealed in error.

On March 29, 1883, the Legislature passed an act, chapter 105 of the printed acts, entitled: "An act to provide more just and equitable laws for the assessment and collection of revenue for State, county and municipal purposes," etc. On the next day, it passed another act, chapter 106 of the printed acts, entitled: "An act to provide revenue for the State of Tennessee and the counties thereof." Both of these acts were approved by the Governor on March 30, 1883,

and went into effect at once. By the 46th section of the first of these acts, it is provided: "That the occupations and business transactions that shall be deemed privileges and be taxed, and not pursued or done without license, are the following, viz:" enumerating a large number, but not including commercial agencies. By the 4th section of the second of these acts, it is provided: "That the rate of taxation on the following privileges shall be as follows, per annum," among others, commercial agencies $100.

The argument on behalf of the plaintiffs is, that until the Legislature creates a privilege it cannot be taxed, and that an avocation is not a privilege unless prohibited in general by the law, in which case the license to pursue it becomes a privilege: *Mabry* v. *Tarver*, 1 Hum., 94. The contention is that there must be positive prohibition by law of the business of conducting a commercial agency, and that there has been no such prohibition in the case of a commercial agency. But this is taking the language of the court too literally. A privilege has been repeatedly defined by this court to be the exercise of an occupation or business which requires a license from some constituted authority: *French* v. *Baker*, 4 Sneed, 193; *Robertson* v. *Heneger*, 5 Sneed, 257; *State* v. *Schleier*, 3 Heis., 281. A positive prohibition is not essential, the requirement of a license carrying with it a prohibition to act without it. And the act sustained in the case of *State* v. *Schleier* only required a license by the payment of a privilege tax without more. We all agree that the language of the act of 1883, chapter 106,

section 4, namely: "That the rate of taxation on the following privileges shall be as follows," naming the avocations or business and the rate of tax, would ordinarily be sufficient to create a privilege, and forbid its exercise without a license, there being a constituted authority designated by law for the issuance of licenses. The real difficulty grows out of the fact that the Legislature has passed two acts, one of them apparently intended, among other things, to designate the taxable privileges, and the others to fix the rate of taxation on privileges. And the doubt is whether the latter act was actually intended to create a privilege.

The point is one of some nicety. The first of these acts, in addition to the title already given, is also entitled an act "to repeal all laws now in force whereby revenue is collected from the assessment of real estate, personal property, privileges and polls." And the other act in its enumeration of taxable avocations has mentioned several not included in the first. If now, all laws in force as to privileges are repealed, the avocations mentioned in the second act, and not in the first, would not be taxable at all except by virtue of the act in which they are contained. They were mentioned unquestionably with the expectation that they were to be taxed, and if the Legislature have used language sufficient to enable us to carry that intent into effect, it would seem to be our duty to effectuate the intent. We think this the better conclusion, and hold the occupation taxable.

His Honor, the trial judge, was in error in holding that the plaintiffs were not liable for the State

tax for the exercise of the agency in Shelby county. Each separate office in different counties is taxable in the same way as if carried on by separate persons or firms.

The judgment below will be reversed as to the State tax, and a judgment entered here in favor of the defendant against the plaintiffs for the costs of the cause.

E. G. RIDGELY, Adm'r, *v.* SCOTT BENNETT *et als.*

1. PLEADINGS AND PRACTICE. *Writ of error.* The proper mode of proceeding to obtain a writ of error, after the lapse of two years from the rendition of the judgment or decree, is by a petition, properly sworn to, stating the facts which take the petitioner's case out of the usual limitation.

2. SAME. *Same. Motion to dismiss.* The appellee may contest the material facts of the petition by plea, and those facts will be taken as true upon a motion to dismiss the writ of error.

3. SAME. *Same* A writ of error is in the nature of a new suit, and any person who brings himself within the saving of the statute is entitled to it as of right.

4. SAME. *Same. Infant.* Any person who will give the bond required by law may sue out a writ of error for an infant as his next friend.

5. SAME. *Same. Same. Married women.* The Code, sec. 3182, which authorizes infants and married women to prosecute writs of error within two years after the removal of disability, merely extends the time for suing out the writ, and the writ may be sued out at any time within the extended period, whether the disability exist or has been removed.

FROM GIBSON.

Appeal in error from the Law Court at Humboldt. J. T. CARTHEL, J.

JOHNSON & SHARP for Ridgely.

L. L. HAWKINS for Bennett.

COOPER, J., delivered the opinion of the court.

A motion has been made in this case to dismiss the writ of error granted by the court on April 10, 1884.

The suit was commenced on October 10, 1871, by petition filed in the Law Court at Humboldt by the administrator of R. H. Porter, deceased, against the widow and heirs of the deceased to sell lands descended for the payment of debts. Such proceedings were had in the cause that the lands were sold, and the cause retained for the collection and paying out of the proceeds of sale. The last order touching the assets seems to have been made in 1878. In 1883, the death of the original administrator was suggested and proved, and the cause revived in the name of Ridgely as administrator *de bonis non* of Porter. The marriage of Mary, one of the daughters of the deceased, was at the same time made known, and Scott Bennett, her husband, allowed to become a defendant. The original guardian *ad litem* of the infant heirs also then resigned, and a new guardian *ad litem* was appointed in his place. The writ of error was granted upon the petition of Bennett and wife, and the other heirs of the intestate Porter, three in number, by Scott Bennett as their next friend. The petition, which is sworn to by Bennett and wife, states that the petitioning heirs were all infants at the institution of the suit, and during its progress, that Mary, now the wife of Bennett, came of age June

15, 1882, less than two years before the application for a writ of error, and that the other petitioning heirs are still under age.

Upon an application for a writ of error more than two years after the rendition of the decree or judgment sought to be reviewed, the proper mode of proceeding is by petition stating the facts which take the petitioners out of the ordinary period of limitation. They must establish a *prima facie* case which will entitle them to the writ under the statute. If the appellee contest the facts, he must do so by plea. A motion to dismiss the writ admits the facts to be as set out in the petition, or, at any rate, upon such a motion the facts will be taken as true. The truth of the statements of the present petition is not disputed in the argument submitted on the motion to dismiss.

By the Code, the period of two years from the rendition of the final judgment or decree is the extreme limit allowed persons *sui juris* to sue out a writ of error. But by the Code, section 3182, infants and married women "may prosecute writs of error within the time prescribed after disability removed." A writ of error is in the nature of a new suit, and may be obtained as of right by any person entitled to it, just exactly as he may sue out a summons in an ordinary action upon compliance with the prescribed requirements: *Spurgin* v. *Spurgin*, 3 Head, 23; *Mowry* v. *Davenport*, 6 Lea, 80. And persons who bring themselves within the saving of the Code, section 3182, are entitled, as of right, to the writ,

without reference to the relief they may be able to obtain by it: *Caldwell* v. *Hodsden*, 1 Lea, 305. The settled law of this State is that any person who will give the bond required by law, may bring an action in the name of an infant as his next friend: *Cargle* v. *Railroad Company*, 7 Lea, 718. A writ of error, which is in the nature of a new suit, may therefore be sued out by a next friend. The decrees for the sale of the lands of the estate and the disposition of the proceeds were final decrees, the subsequent references for reports being merely orders on further direction: *Caldwell* v. *Hodsden*, 1 Lea, 45. *Prima facie*, the petitioners were entitled to the writ of error in this case, and it was properly sued out.

The learned counsel who makes the motion to dismiss, seems to think that persons under disability must sue out a writ of error within the two years of the general law, and that if they fail to do so they cannot obtain a writ of error until after the disability is removed, and within two years from such removal. But this is a misapprehension of the law. The statute merely extends the time for suing out the writ until two years after the removal of the disability. And it was so expressly ruled in *Caldwell* v. *Hodsden*, 1 Lea, 305, as to one of the petitioners, who was a married woman when the suit sought to be reviewed was commenced, and during its progress, and when the application for the writ of error was made.

The learned counsel represents purchasers of the lands sold under the decrees below, and earnestly in-

sists that the writ ought not to be granted because the title of his clients cannot be affected, and the litigation would be to no purpose. This may be so, if the proceedings are merely erroneous, not void. But, as we have seen, the writ is a matter of right, like an appeal, when the party shows himself entitled to it, whether the applicant can obtain any relief or not.

The motion must be disallowed.

13L 210
15L 199

E. G. RIDGELY, Adm'r, *v.* SCOTT BENNETT *et al.*

1. PLEADINGS AND PRACTICE. *Mere irregularities will not affect sale.* If a superior court have jurisdiction of the subject-matter and the parties, mere irregularities in the exercise of that jurisdiction will not render the proceedings void, nor, upon a writ of error, affect the validity of sales of property made in the cause to innocent third persons.

2. SAME. *Sale of land to pay debts. Administrator.* The Code, section 2267, *et seq.*, authorizing personal representatives to file petitions for the sale of land to pay debts, does not require the creditors of the estate to be made parties, nor a report of the debts and assets as a preliminary to the exercise of jurisdiction; nor is it any objection that upon taking the account with the administrator he may be found to have personal assets in his hands; and premature action may be validated as to purchasers by a failure to appeal, and subsequent recognition by the court of what has been done.

3. SAME. *Same. Guardian ad litem.* The proceedings in such a case are not avoided upon a writ of error, as to purchasers by the omission of the name of one of several infant defendants in the order appointing the guardian *ad litem*, if the answer be in the name of all,

and repeatedly recognized by the court as their answer. The appointment of the guardian *ad litem* need not be renewed upon the filing of an amended and supplemental petition, and the failure of the guardian to swear to a mere formal answer is immaterial.

4. SAME. *Same. Rights of purchasers.* If the errors complained of do not avoid the proceedings as to third persons, the court will not reverse the decrees for such errors so as to cast a cloud upon the rights of purchasers.

FROM GIBSON.

Appeal in error from the Law Court at Humboldt. J. T. CARTHEL, J.

JOHNSON & SHARP for Ridgely.

L. L. HAWKINS for Bennett.

COOPER, J., delivered the opinion of the court.

Proceedings by petition in the Law Court at Humboldt, under the Code, section 2267, *et seq.*, by an administrator to sell lands for the payment of debts. The petition was filed October 16, 1871, and the case brought before us by writ of error sued out by the heirs on April 10, 1884.

R. K. Porter died in 1870, intestate, leaving a wife and five children. George S. Reiney was appointed and qualified on January 1, 1871, as administrator of the intestate's estate. He filed his original petition in the following October against the widow and heirs, upon whom process was duly served. The petition was taken for confessed against the widow, and it seems that she has since died. Upon motion of the complainant, W. I. McFarland, an attorney of

the court, was appointed guardian *ad litem* for four of the heirs, naming them, it being shown that they were under age, and had no regular guardian. The petition alleged that the five heirs were infants, but the name of one of them, Mary Porter, now the wife of Scott Bennett, was not included in the order appointing the guardian *ad litem*. An answer was, however filed, in the name of all of the five heirs by W. I. McFarland as their guardian *ad litem*. The answer was not sworn to. On February 13, 1872, another petition was filed by the administrator against the heirs, stating the death of the widow, asking for the sale of other lands of the estate to pay debts. Process issued on this petition and was served upon the heirs. An answer was filed in the name of all the heirs by W. I. McFarland, as their guardian *ad litem*, without any new order of appointment.

The original petition alleged that the administrator had received available assets to the amount of $——, and had applied them all to the payment of the debts and liabilities of the estate, leaving *bona fide* debts unpaid to the amount of about $2,460. These debts are then set out by the names of the creditors and the amount due each. The lands sought to be sold were fully described. On November 9, 1871, the cause was referred to the master, by a general order without any recitals, to take an account of the personal assets that came or ought to have come into the hands of the administrator, and what disposition he had made thereof; and to take proof and report the amount of debts outstanding and unpaid against

the estate, and whether it was necessary to sell any or all of the land for the payment of debts. The clerk was required to report to the same term. On the next day, the clerk, in the presence of the guardian *ad litem*, and the petitioner's counsel, took the deposition of the administrator upon the matters of reference. The administrator testified that he had received as personal assets a note on a person named for $350, and held the notes of various parties given for property sold by him as administrator amounting to $1,168.80, all these notes being payable on the 25th of the succeeding December. That the *bona fide* debts would amount to $3,500, and he set out specifically the debts mentioned in the petition. He added that it was necessary to sell the real estate or a sufficiency thereof to pay the debts. The clerk reported the facts accordingly, and on the same day the report was, without exception confirmed. The decree of confirmation recited that the cause came on to be heard upon the petition, order *pro confesso*, answer of guardian *ad litem*, interlocutory order, proof and report. It further recited the death of the intestate, the names of his widow and children, and the qualification of the administrator as hereinbefore stated. It also recited that it appeared to the court that the personal assets which had come to the hands of the administrator amounted to $1,518.80, and that the indebtedness of the estate amounted to $3,500 to $4,000, and that the intestate died seized of certain lands described, and "that it will be necessary to sell a portion or all of said land to pay the indebtedness of the estate." It

was thereupon decreed that the clerk sell so much of the land as would be necessary to pay said indebtedness, prescribing the terms of sale.

On November 11, 1872, the clerk retook the deposition of the administrator in the presence of the guardian *ad litem* and the solicitor of the petitioner. He deposed that there were *bona fide* unpaid debts and liabilities of the estate to the amount of about $4,000; that a large part of the personal assets had been paid out on just debts; that the remaining assets, and proceeds of lands sold would fall far short of paying the debts, and that it was necessary to sell the other lands to pay debts. On November 15, 1872, a decree was rendered, reciting that the cause came on to be heard "upon the amended petition, answer of the guardian *ad litem* and proof," when it appeared that the administrator had exhausted all the personal effects that came or should have come to his hands in the payment of *bona fide* debts and charges; that the real estate already sold by decree will fall far short of paying the remaining debts and charges, etc. The clerk was thereupon ordered to sell the land described.

On March 11, 1873, a decree was rendered confirming sales of land made on January 27, and May 18, 1872, under the decree of November 10, 1871, and divesting and vesting title accordingly. At the same time the clerk made a report of sales under the decree of November 11, 1872, and of offers to advance the biddings, which offers were accepted by the court, and titles divested and vested accordingly. The

decree made a reference to the clerk to take proof and report what would be a reasonable fee for the solicitor of petitioner, and also for the guardian *ad litem.*

On July 10, 1873, the clerk was directed to report the amount of personal assets in the hands of the administrator not disbursed, the debts of the estate unpaid, the real estate sold by order of the court, the amount in the hands of the clerk realized from the sales, and the amount still due on the sales. Following this order, the transcript contains a report of the administrator, and then a report of the clerk. These reports show that the administrator received personal assets to the amount of $1,415.61 and had disbursed the sum of $1,942.24; that the debts unpaid, as far as known to the administrator, excluding costs and counsel fees, were $3,230.48; that the whole amount of indebtedness, as far as known, was $5,183.72; that the proceeds of land sales were $3,608.54, and of sales and personalty $5,024.15. That there is a deficiency of asssets to pay debts of $159.57, to which must be added costs and counsel fees. On July 18, 1873, a decree was rendered, reciting that it appeared from the clerk's report that the personal assets and proceeds of land sales were insufficient to pay debts of the estate and costs, the former orders of sale were revived. At the same term, a report was confirmed allowing the solicitor of petitioner a fee of $350, and the guardian *ad litem* $25. The residue of the lands were afterwards sold, the biddings opened, and sales confirmed February 27, 1874, and titles divested and vested.

In February, 1875, an order of reference was made to the clerk to take proof and report what claims against the estate had been paid, the amount paid, to whom paid, and whether said claims were valid and owing; what claims filed with the administrator are unpaid, when due and amount. On March 29, 1876, the clerk was again ordered to take proof and report what debts had been paid by the administrator, whether the same have been reported upon heretofore or not, and what debts are still unpaid. On the 22d of November, 1877, the clerk was directed to report what debts had been reported as paid which had not been paid. Under this last order, the clerk reported that two claims, one of $100 and the other of $18.25 had not been paid, although the administrator had received credit therefor in his settlement with the county court clerk. This report, not being excepted to, was confirmed by a decree of March 27, 1878, and the two claims ordered to be paid. In the meantime, judgments had been taken on sale notes, some of the lands resold, and other lands sold, and sales confirmed. An anditional fee to the solicitors of the administrator of $250 was also allowed. Nothing more seems to have been done until November 29, 1883, when the death of the administrator was suggested and proved, and the cause revived in the name of E. G. Ridgely as administrator *de bonis non* of R. K. Porter. Scott Bennett having intermarried with Mary, one of the heirs, was allowed to become a defendant. And the guardian *ad litem* was permitted to resign, and a new guardian was appointed. The transcript

shows no further step in the cause until the suing out of the writ of error.

The decrees confirming the sales of the lands descended were final decrees from which an appeal or writ of error would lie. The proceedings necessary to effect and perfect these sales have been fairly well attended to. All the other orders and decrees, especially those made upon further directions, have been obeyed loosely or not at all. And we do not find any order for the payment of the proceeds of the sales of the lands, unless it be for the fees of the solicitor of the administrator and the guardian *ad litem*, and of the two small claims reported as unpaid although the administrator had received credit for their payment in his settlement with the county court. There has been no settlement of the administrator's accounts in the circuit court, nor any final disposition of the funds in the control of the court.

The first and most material point to be considered is whether the proceedings have been sufficiently regular to render the sales of the land valid upon a direct appeal. The administrator was authorized by the statute to file a petition or bill for the sale of the lands of the estate to pay debts. The heirs of the intestate were regularly made parties defendant to both the original and amended bills, and served with process under each. The court, therefore, had jurisdiction of the subject-matter and the parties. But the proceedings have been marked with many irregularities.

Several particular errors are relied on for reversal. The order appointing the guardian *ad litem* under the

original petition did not contain the name of Mary Porter, one of the heirs, and there was no order of appointment under the amended and supplemental bill. The answer of the guardian *ad litem*, moreover, is not sworn to. The circuit court being a court of general or superior jurisdiction, every presumption is in favor of the regularity of its proceedings, although in the particular case the jurisdiction be statutory if conferred by a statute of a general nature: *McGavock* v. *Bell*, 3 Cold., 512; *Kilcrease* v. *Blythe*, 6 Hum., 378. In a court of inferior jurisdiction, if the right of the guardian *ad litem* to act turn exclusively upon the order of appointment, the order ought perhaps to name the infants: *Rucker* v. *Rucker*, 1 Heis., 726. But even in such case the defect might be cured by the recognition of the guardian by the court. In this case, the petition, which was sworn to, states that all the heirs of the intestate are infants. The answer of the infants, which is filed by the guardian *ad litem*, is in the name of all of them, and both the first decree under the original petition settling rights, and the first decree of the same character under the amended and supplemental petition, expressly recites that the cause was heard upon the answer of the infants by their guardian *ad litem*, thereby recognizing the guardian as the guardian of all of them. A renewal of the order of appointment under the amended petition would have been a mere form. If the answer had undertaken to state facts, or make admissions, it should have been under oath, but the answer was merely formal, stating that the infants did not know how

the facts were, and submitting their rights to the protection of the court. An oath could have added nothing to such an answer. Even the failure of the record to show the appointment of the guardian *ad litem*, would not be fatal on a direct appeal, where the court is shown in its decrees to have recognized the guardian as the proper representative of the infant: *Bank of Linnville* v. *Leftwick*, 9 Baxt., 471. The irregularities mentioned are, therefore, not sufficient to authorize a reversal of the decrees. And there is nothing in the objection that the lands descended could not be sold for the costs and expenses of the administration. For the administrator being specially authorized to institute the proceedings to prevent the accumulation of costs, would be entitled to be reimbursed his necessary costs and expenses, and the counsel employed would be subrogated to his rights in this behalf.

These are the only specific errors assigned by the counsel of the appellants for reversal. There is a general allegation that the sales were void even in a collateral attack. But if the court had jurisdiction of the subject-matter and the parties, mere irregularities in the exercise of that jurisdiction would not render the sales void. The case made in the pleadings and decree can alone be looked to in testing the jurisdiction: *Kindell* v. *Titus*, 9 Heis., 727, 736. The act of 1827, brought into the Code section 2267, *et seq.*, does not require the creditors of the estate to be made parties to the suit: *Vance* v. *Saunders*, 9 Baxt., 294. It is enough if the debts are con-

ceded to be valid in the bill, or subsequently by the administrator: *Id.* The act does not require a report of debts or assets as a preliminary to the exercise of jurisdiction: *Kindell* v. *Titus*, 9 Heis., 727, 738. Nor is it any objection that upon taking an account with the administrator he may be found to have pereonal assets in his hands: *Dallas* v. *Read*, 6 Yer., 53. And premature action may be validated by a failure to appeal, and subsequent recognition by the court of what was done, when the defect no longer existed. If the proceedings are not void, mere irregularities will not affect the title of innocent third persons who became purchasers under the decrees. Code, sec. 3186. And the court would not reverse the decrees for such errors so as to cloud the rights of purchasers: *Lewis* v. *Baker*, 1 Head, 386.

The record does not show any regular settlement with the administrator of his receipts and disbursement, nor any accurate account of the debts of the estate, or the payments made thereon, out of what funds, and by whom, although ordered. Nor does it appear that the clerk has been ordered to disburse, or has legally disbursed funds which came to his hands from the sales of the realty. The cause will, therefore, be remanded for the execution of the orders of reference, and for such further orders and decrees as may be necessary to adjust the rights of the infants in the funds realized from the sale of the lands.

The judgments and decrees of the circuit court will therefore be affirmed, and the cause remanded for the purposes specified above. The appellants will pay the costs of this court.

13L 221
117 372

THE STATE v. HOWARD PARKER.

1. CRIMINAL LAW. *Assault and battery. Charge of the court.* It is not error for the court to omit to charge upon all the grades of the offense embraced in the indictment, if the facts in the case do not require a charge upon the grade of offense omitted. If the omission or the error in the charge is in favor of the defendant he cannot complain.

2. SAME. *Charge of court.* It is not error to refuse to charge upon a *mere abstraction.*

3. SAME. *Same.* The court cannot charge the jury that when arresting a person, "the officer shall inform him of the authority and cause of arrest, and exhibit the warrant if he has one"—*if the defendant questions his authority*—"except when the person being arrested is in the act of committing some offense in the presence of the officer," and the testimony showed that the defendant knew that the officer was seeking to arrest him and fled and concealed himself behind some bushes, and the officer called to him to come out, stating that he had a warrant for his arrest, when the defendant shot the officer. Held, not error.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. J. M. GREER, J.

McCABE & BROOKS and —— DOUGLASS for Parker.

ATTORNEY-GENERAL LEA for the State.

COOKE, Sp. J., delivered the opinion of the court.

The defendant was convicted of an assault and battery upon one Jo. Holmes, with intent to commit murder in the first degree. The evidence in the cause fully warrants the verdict, and the only questions that have been seriously urged arise upon the charge of

the court. In his charge, the court instructed the jury that there were four different offenses contained in the indictment, and proceeded to instruct them properly as to what was required to constitute an assault and battery with intent to commit murder in the first degree, and also murder in the second degree, and then proceeded: "If you do not believe that the shot was either fired with a formed design to kill Holmes, nor with malice, and you believe it was fired at, and struck Holmes intentionally, on the part of Parker, then you will convict him of a simple assault and battery;" thus ommitting to instruct the jury as to what would constitute an assault and battery with intent to commit voluntary manslaughter, or rather erroneously instructing them that if they found certain facts which would have authorized a conviction for that offense, they should convict the defendant of a simple assault and battery. In the case of *Good* v. *The State,* 1 Lea, 293, it was decided that under the provisions of the Act of 1877, ch. 85, sec. 1, it was not error for the court to omit to charge upon all the grades of offenses embraced in the same indictment if the facts in the case did not require a charge upon the grade of offenses omitted. The omission in this case, or the error in the charge, was directly in favor of the defendant, and it was impossible that he should have been prejudiced by it.

The court was specially requested by the defendant to charge the jury that if "they believed from the proof that the defendant shot Holmes while he

was approaching him under such circumstances as would produce in the mind of a reasonable man an apprehension that there was a design to take away his life, or to do him some great bodily harm, the defendant would be justified in such shooting on the grounds of self-defense, though it should turn out afterwards that there was no danger." This instruction was refused by the court, as the record states, because there was nothing in the proof to warrant the charge. This refusal is assigned as error. The record wholly fails to show that the defendant was in any danger either of his life or great bodily harm at the time he did the shooting, there being no testimony tending to establish such a state of facts. The charge requested under the facts disclosed by the record would have been a mere abstraction, and it was not error to refuse it: *Williams* v. *The State*, 3 Heis., 376; *May* v. *The State*, 3 Heis, 379.

Holmes had a warrant against the defendant for a misdemeanor, and had been specially deputized to arrest him upon it, and was attempting his arrest at the time he was shot by the defendant. The defendant's counsel also requested the court to charge, the language of the statute, that when arresting a person "the officer shall inform him of the authority and cause of arrest, and exhibit the warrant if he has one, except when the person being arrested is in the act of committing some offense in the presence of the officer." The court modified the instruction as requested, by adding the qualification, "if defendant questions his authority," after the words "he

shall exhibit the warrant if he has one," and gave the instruction as thus modified, and the defendant excepted to the modification. The testimony showed that the defendant knew that Holmes was seeking to arrest him, and fled from him and those accompanying him, and concealed himself behind some bushes. When he was discovered Holmes called to him to come out, and stated that he had a warrant for his arrest, when the defendant shot him in the breast. One of the witnesses states Holmes was about to read the warrant to him when he was shot. But the testimony of both of the witnesses to the transaction shows that the defendant shot Holmes immediately upon being informed that he had a warrant for his arrest, and that defendant neither requested nor gave time to the officer to inform him of the cause of his arrest before he shot him. It was not error in the court in view of the facts of the case to qualify the instruction to the extent which he did.

The defendant's counsel also requested the court to charge that "no officer, though armed with a warrant to make an arrest for a misdemeanor, has the right to shoot at or kill a person who attempts to escape from arrest; and if an officer makes an assault upon a person against whom he has a warrant such person has a right to resist such assault, and defend himself from any wrong or injury from the officer." This request was also refused by the court, and which is insisted for defendant was error. The proof showed that Holmes with two other persons went to the house of one Wilcox, where the defend-

ant was, with a warrant for the purpose of arresting him; that he called at the door, which was opened by Wilcox, when he said "good evening," and asked if defendant was there, and was told that he was. Holmes then stepped forward as though he was going into the house, when the defendant said keep back, and shot at him and fled, and a shot or shots were fired after him, none of the shots of either party however taking effect, He was pursued by Holmes, and those with him, and some ten or fifteen minutes after this he was found some two hundred and fifty yards from the place where this occurred, concealed behind some bushes when he was told by Holmes to come out that he had a warrant for his arrest, and was shot by him in the breast as above stated.

There was nothing in the testimony, as we see it, to which the charge requested was applicable, and it was properly refused. There is no error in the record, and the judgment of the circuit court must be affirmed.

THE STATE *v.* HOWARD PARKER.

1. CRIMINAL LAW. *Carrying pistol. Merger.* While the defendant can not be convicted of a separate offense for having a pistol at the time he did certain shooting, for which he has been convicted of assault with intent to commit murder, yet if the offense of carrying a pistol was complete before the shooting, the defendent may be convicted of carrying a pistol.

State v. Parker.

2. SAME. *Sentence of the court.* Where a person is convicted of both a felony and a misdemeanor, it is proper that the judgment in the more severe sentence be executed first, because this affords less opportunity of escaping proper punishment.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. J. M. GREER, J.

McCABE & BROOKS and —— DOUGLASS for Parker.

ATTORNEY-GENERAL LEA for the State.

COOKE, Sp. J., delivered the opinion of the court.

The defendant was indicted for carrying a pistol and convicted, and has appealed to this court. The bill of exceptions is as follows: "And in the case of the State against Howard Parker for carrying concealed weapons, it was agreed by the attorney-general and the counsel for defendant, that the testimony should be heard in both cases, while only the first case was on trial, and the two were tried together at the request of the defendant. That the proof showed that Howard Parker drew his pistol, that it was a small pistol and not an army or navy pistol. That this was in Shelby county—a few days before the indictment in this case was found. The above agreement is furnished as a bill of exceptions in the pistol case and the court accordingly signs it as such."

There is nothing whatever in this record to show what other case is referred to, or what that other case was; for, or what testimony there was in that

other case. There is nothing to connect or identify this with any other transaction. There is no charge of the court nor any statement that the facts admitted by the argument was all the evidence in the cause. Hence there is no error that we can see in the record.

It is assumed, however, by counsel for the defendant, that the carrying a pistol for which the defendant is indicted, is the same as that disclosed in the case of the State against him for assault and battery with intent to commit murder, and for which he has been convicted, and in which case the judgment has just been affirmed. And upon this assumption it is insisted that the carrying the pistol with which the shooting in that case was done by the defendant, was part and parcel of that offense, and is merged in it, and hence the conviction in this case was improper. If we assume, however, that the carrying a pistol for which this conviction has been had was the same carrying that has been disclosed in that case, then, as we have seen in the opinion just announced, the record in that case shows that he had the pistol when Holmes, the officer whom he shot, first found him at Wilcox's house, that he carried it with him when he fled to the bushes where he concealed himself. Hence the offense of carrying it was complete before he did the shooting with it, for which he has been convicted in that case. And although he could not be convicted for a separate offense for having the pistol at the time he did the shooting, yet he might be properly convicted for the previous carrying before he was discovered and confronted by the officer whom he shot.

But whether this were so or not, as this record is presented, we are compelled to affirm the judgment, which in this case will be executed after the expiration of the term of imprisonment in the penitentiary to which the defendant has been sentenced, as we deem that the more proper order to be made in such cases, as affording persons convicted of both a felony and misdemeanor less opportunity of escaping before the execution of the more severe sentence.

13L 228
14L 708
4pi 553

CON DALY *v.* THE STATE.

CONSTITUTIONAL LAW. *Partial law.* The act of 1883, ch. 138, creates a privilege, and limits the exercise of the privilege to certain corporations, and is a partial law, and unconstitutional.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. J. M. GREER, J.

W. H. CARROLL and S. P. WALKER for Daly.

ATTORNEY-GENERAL LEA for the State.

COOPER, J., delivered the opinion of the court.

The plaintiff in error was indicted in one count for that, on September, 1883, he did unlawfully bet and wager money upon horse races run outside of the

limits of the State of Tennessee. And in a second count for that, on the same day, he did unlawfully bet and wager money upon a horse race run outside of the limits of the State, and unlawfully did aid and abet, assist and encourage the making of certain bets upon said races. The court overruled a motion to quash the indictment, and held the act of 1883, ch. 138, under which the defendant claimed to be protected, unconstitutional. The case was then tried upon an agreed state of facts by the court, and judgment rendered against the defendant, from which he appealed in error.

The agreed facts are that Daly did, within six months of the finding of the indictment, and in Shelby county, sell a pool on a race run in the State of Kentucky, on a licensed course of that State; that in making the sale he was acting under and by the authority of the new Memphis Jockey Club, which club was then and now a lawfully chartered and organized blood-horse association under the laws of this State, having its *situs* in the county of Shelby. It was agreed that the judgment should be for or against the defendant, as the court may determine the act of 1883 to be constitutional or not.

The act makes it a misdemeanor, punishable by fine, "for any person to sell pools, or to make any betting book or combination upon any race run, trotted or paced in this State, or in any other State of the United States, unless the said pool-selling, book making or combination be conducted or made under and by the authority of a lawfully chartered or incorpoaated

blood-horse or turf association, or trotting association, or stock or agricultural fair association of this State, and then only in the county in which said association or fair may be located. It is further enacted that any association operating under the provisions of this act shall pay an annual tax for the privilege to the State of $100, and that the counties may collect a tax on the same not to exceed the State tax.

By the Code, section 4870, it is made a misdemeanor to bet or wager for money or other valuable thing, and the mere making a bet or wager is indictable, the only effect of adding to the charge of betting the specific game, contest or issue upon which the bet or wager was laid being to throw upon the prosecution the *onus* of proving the fact as alleged: *State* v. *Blackburn*, 2 Cold., 235. In misdemeanors there are no accessories either in name or the order of prosecution. When, therefore, one sustains in misdemeanors a relation which in felony makes an accessory before the fact, if what he does is of sufficient magnitude, he is to be treated as a principal, and the indictment may charge him as such: 1 Bish. Cr. Law, sec. 685; *State* v. *Bonner*, 2 Head, 135; *Harvey* v. *State*, 8 Lea, 113. Betting on a horse race is a misdemeanor under this law if not within the exemption of the Code, sec. 4881, which exemption was intended for the encouragement of the raising of fine stock in this State: *Huff* v. *State*, 2 Swan, 279; *State* v. *Blackburn*, 2 Cold., 235. We held, therefore, that selling a pool on a race run in another State was betting and indictable: *Edwards* v. *State*,

8 Lea, 411. The defendant was properly convicted unless protected by the provisions of the act of 1883, under the agreed facts.

That act is open to the objection of the attorney-general that so far as it is positive in its terms it simply makes unlawful what was unlawful before, and only makes an exemption by implication. But the court must look to the intent of the Legislature, and that intent seems to have been to legalize betting by pool-selling upon races run, trotted or paced in other States, provided the sale was "conducted or made under and by the authority of a lawfully chartered" blood-horse association in the county of its location. This has been attempted to be done, not by a general law directly increasing the powers of such corporations, but by a general criminal law with an exemption in favor of such corporations.

By the Code, sec. 50, the word person is made to include a corporation, a result which would probably have followed without the general provision. The act under consideration is a general penal statute which undertakes to exempt a particular class of corporations or chartered associations from its purview. The Constitution, Article XI., section 8, provides: "The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to individuals rights, privileges, immunities or exemptions other than such as may be by the same law extended to any

members of the community who may be able to bring himself within the provisions of such law." The same section, it is true, by way of proviso, authorizes the creation of corporations, and the increase and diminution of their powers by general law. But after a corporation is created for any purpose, and with specified powers, it becomes a person within the meaning of our penal laws, or other general laws, and subject, like individuals, to those laws. Its powers may be increased or diminished by general law, but it can no more be exempted than an individual citizen from the purview of a penal law: *Lea* v. *State*, 10 Lea, 478. The exemption of classes of persons, not individuals, from the penalties of prohibiting acts is a different question: *Maney* v. *State*, 6 Lea, 218; *State* v. *Rauscher*, 1 Lea, 96; and see *Davis* v. *State*, 3 Lea, 376.

The question is, consequently, narrowed down to this, was the act intended to increase the corporate powers of the particular class of corporations? And clearly it was not, for the powers and privilege is not extended to all of these corporations, but is restricted to such of them as choose to pay an annual tax therefor. What the statute in fact does is to create a new privilege, the right to sell pools, and make betting books upon races run either in or out of the State, and to limit the exercise of this privilege to a certain class of corporations. This cannot be done. A privilege created for individual profit and taxation must be open to every member of the community who may be able to bring himself

within the provisions of the general law which creates the privilege.

To sell pools on horse races, we learn from the counsel of the plaintiff in error, is selling the right to select one of a number of the horses entered for a race upon the chance of his winning, the money of the various purchasers being put into a pool or common fund to be paid, after deducting the seller's commissions, to the successful bidder. In *Bell* v. *State*, 5 Sneed, 507, which was a prosecution for carrying on a "gift enterprise," Judge Caruthers, in delivering the opinion of the court said: "A lottery is a game of hazard, in which small sums are ventured for the chance of obtaining greater. Now what is the case before us? Is it not that species of gaming called a lottery? A small sum is ventured for the chance of a greater; one dollar or five dollars perhaps for a book and the chance of a watch valued at $40. * * So all pay their money, at least in part, for the chance of winning a prize of greater or less value." In the case now under consideration all the money is paid for the chance of winning the whole, less commissions. If a gift enterprise be a lottery, pool selling would perhaps be a lottery also. And our Constitution expressly forbids the legislation to authorize lotteries for any purpose: Const., Art. XI., sec. 5. The point has not been argued, and it is not necessary for us definitely to decide it, or to even intimate an opinion upon it.

Judgment affirmed.

E. D. MORGAN & CO. *v.* MERCHANTS' NATIONAL BANK OF MEMPHIS.

1. STATUTE OF LIMITATIONS. *Power of bank president to bind the bank.* Where L., D. & Co., a firm of which D was a member, guaranteed to M. & Co., a New York firm, certain advances, and agreed to hold them harmless on account of same, and M. & Co. made the advances to the defendant bank in Memphis, more than six years before action brought, and D having become president of the bank, and being in New York on other business within six years before action brought, saw M. & Co, who threatened to sue the bank, whereupon D, the president, admitted the claim sued on to be just and due by the bank, and requested time, and promised in case of delay to sue, the bank should not plead the statute of limitations, and M. & Co. waited as requested. *Held*, this action of the president revived the debt against the bank, and the same was not barred by the statute of limitations, and that the fact that this was done in New York, and that D, the president, was guarantor of the debt, there being no antagonism between him and the bank, made no difference.

2. PRACTICE. *Bill of exceptions.* Although bill of exceptions is duly made out under act of 1875, an appeal only lies after final judgment.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W. W. MCDOWELL, Ch.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

ESTES & ELLETT for Morgan.

W. D. BEARD for Bank.

DEADERICK, C. J., delivered the opinion of the court.

This suit was brought in the circuit court at Memphis to recover for advances made to defendant on shipment of cotton in excess of the proceeds of its sale realized by plaintiffs. The defendant pleaded *nil debit*, payment, and the statute of limitations of six years.

The account is satisfactorily proved and there is no evidence of its payment, so that the real and sole defense is the statute of limitations. The suit was begun May 4, 1875, and the last of the cotton sold in June, 1868, leaving a balance due to plaintiffs of $8,161.50, for which an account was rendered and payment requested July 8, 1868.

The shipment of the cotton, and the drafts of the defendant, drawn by A. T. Lacey and endorsed by W. H. Cherry, President, took place in February and March, 1867.

On the 25th of February, 1867, Lewis, Daniel & Co., a firm of the city of New York, by letter addressed to E. D. Morgan & Co., guaranteed the payment of any advances made by them on the consignments of cotton made by A. T. Lacey for the benefit of the defendant, the Merchants National Bank of Memphis.

After the 8th of July, 1868, plaintiffs sent from time to time statements of their account, W. H. Cherry being president of defendant up to January 1, 1870, but he seems not to have replied directly to these demands of payment. In April, 1872, R. C. Daniel,

of the firm of Lewis, Daniel & Co., became president of defendant, the Merchants' National Bank of Memphis, and the said Daniel states that the account of plaintiffs, for upwards of $8,000, was included in a statement of the bank's assets and liabilities furnished him by the officers of the bank, as an existing liability. Daniel also states that in December, 1872, being then in New York, he had a conversation with a member of the firm of E. D. Morgan & Co., in reference to the claim of said firm against defendant. In this conversation, Mr. Humphreys, the member of said firm, alluded to, said that if the claim now in suit was not paid very soon, the firm would bring suit for it. Daniel then assured him that the debt should be paid as soon as the bank could spare the money, and requested the said Humphreys to wait for the debt. He, Humphreys, said the debt might be barred by the statute of limitations, when Daniel assured him that the bank would not avail itself of any such defense, that the debt was just, and urged Humphreys not to sue, and expressed the opinion that the bank would be able to pay all its debts, and all it needed was time to collect its outstanding claims, and upon these assurances Humphreys agreed not to sue.

These foregoing are the promises and acknowledgments, made by the president of the bank to the plaintiffs in December, 1872, at the office of plaintiffs in New York.

If these promises and acknowledgments are sufficient to arrest the running of the statute of limitations, plaintiffs' claim was not barred at the commencement

of this suit, otherwise the claim is barred and plaintiffs cannot recover.

The issues were submitted to a jury December 20, 1880, during the September term of the circuit court, and on December 22, 1880, a verdict was rendered in favor of plaintiffs for the sum of $14,935.56. On the 12th of January next thereafter, on motion of defendant, a new trial was granted. Thereupon, the plaintiffs tendered their bill of exceptions, under the act of 1875, chapter 106, embodying the evidence, the rulings and charge of the court, and the action of the court on said motion, which was signed by the court and made part of the record in the cause.

At the following January term, 1881, on the 14th of March, 1881, the parties submitted the issues to the judge, without the intervention of a jury, and it was agreed that the evidence contained in the former bill of exceptions, filed January 13, 1881, should be heard. The findings of facts and law by the circuit judge are fully set out in his judgment, which was in favor of defendant, and from which the plaintiffs have appealed to this court.

First, His Honor, the circuit judge, finds that the account for $8,161.50 with interest from July 8, 1868, was sufficiently proved and was due by defendant to plaintiffs.

Second, That more than six years elapsed after the cause of action first accrued before the commencement of this suit.

Third, That in the fall of 1872, R. C. Daniel, then president of the Merchants' National Bank, and acting

for said bank, being in New York, then and there admitted the said claim was just and due by defendant to plaintiffs, and promised in case of delay to sue, the bank would not plead the statute of limitations.

Fourth, That said Daniel as such president, under the custom among bank officers, had the power and authority to bind defendant by such promise and agreement, and that the same would be binding on defendant, but for the facts stated in the next finding.

Fifth, That on February 27, 1867, before plaintiffs made any advances to defendant, the firm of Lewis, Daniel & Co., of which said B. C. Daniel was a member, guaranteed the said advances and agreed to hold the plaintiffs harmless on account of the same, in the terms stated in their letter.

Sixth, The conclusion of the court as to the law of the case upon the foregoing facts, is that said Daniel, by reason of said guaranty, occupied such a relation to the transaction as disqualified him in the absence of express authority from the bank, from representing the bank in making said admission, promise and agreement with the plaintiffs, and on that account as well as because the said admission, promise and agreement were made in New York, away from the regular place of business of said bank, and while said Daniel was engaged in attending to another and different matter of business for said bank, which was the object of his journey, the same were not binding on said bank and not sufficient to take the case out of the operation of the statute of limitations.

Thereupon judgment was rendered in favor of de-

fendant and against plaintiffs for costs, from which judgment plaintiffs have appealed in error to this court.

It is now insisted by defendant, that as no appeal after the final judgment was prayed from the judgment granting a new trial, that order of the court cannot now be reviewed here, and as no motion for a new trial was made before appeal from the final judgment, only errors apparent of law and not of facts, are subject to correction. As to this last proposition it is correct, but as we understand the case, the errors complained of are errors of law, and if errors of law apparent from the record, they might be corrected although no new trial was asked: 2 Lea, 396–7; 4 Cold., 405.

The circuit judge had found as facts, that plaintiffs' claim was a just one against the bank; that more than six years elapsed after cause of action accrued before the commencement of the suit; that within less than six years from the time the cause of action accrued, R. C. Daniel, as president of the bank, had promised to pay it, and asking indulgence, promised not to plead statute of limitations; that Daniel, as president of the bank, had power to bind the bank by such promise; that in February, 1867, Lewis, Daniel & Co., of which firm said R. C. Daniel was a member, guaranteed the payment of advances to be made by plaintiffs, and to hold them harmless on account of such advances. And from these facts so found by the court and sustained by the evidence in the record, the court drew the conclusion and decided as matter of law, that defendant was not liable because said Daniel, by

reason of said guaranty, occupied such a relation to the transaction as disqualified him in the absence of express authority from representing the bank in making said promises and admission, and also because the said admission and promise were made in New York, away from the regular place of business of said bank. Pretermitting for the present the consideration of the effect of the finding of the court on the last trial, of the law and facts it is sufficient to say, if the law is held incorrectly by the court upon the facts so found by him, this court may set aside his judgment and render the proper judgment upon the facts so found, which we have before stated are sustained by the evidence.

After the verdict of the jury was rendered in the first trial, the court upon a motion for a new trial by defendant, set aside the verdict and granted a new trial; thereupon the plaintiff excepted to the action of the court on setting aside the verdict and granting a new trial, and tendered his bill of exceptions, which he prayed the court to sign and make a part of the record, which was done accordingly.

The act of 1875 provides "that where a new trial is granted (or refused), either party may except to the decision of the court, take his bill of exceptions and the judge is required to allow and sign the same, and such bill of exceptions shall be a part of the record in the cause, and it shall be lawful for the appellant in such case to assign for error, that the judge below improperly granted or refused a new trial therein, and the Supreme Court shall have power to grant new trials, or to correct any errors of the circuit court in

granting or refusing new trials": Acts of 1875, p. 189. The bill of exceptions in this case was regularly taken at the trial term, and by operation of the act became a part of the record in this cause.

It has been held by this court that no appeal lies from the order of the court granting or refusing a new trial, but the questions arising upon that part of the case are subject to revision in this case, only on appeal after final judgment: 4 Baxt., 438; 8 Baxt., 382; 10 Lea, 533. And in the latter case it was said: "We are of opinion that it was the intention of that act to give the appeal, after final judgment, to the party seeking to have the error of the court in granting a new trial reversed."

In this case we hold that the party appealing has properly brought the case to this court for revision, that the error of the court below may be corrected here by rendering the proper judgment upon the verdict of the jury, if in the opinion of this court the new trial was improperly granted.

The defendant requested the judge to charge the court "that the president of the defendant had no inherent power by virtue of his office, to bind the bank by a promise or agreement not to plead the statute of limitations, and if they should find that Daniel made such a promise without authority, it would not bind the bank." The latter part of this request we construe as meaning if he had no other power than that derived from his position as president, it would not bind the bank.

The record does not disclose that any express au-

thority was conferred by formal action of the Board of Directors upon the president to negotiate for delay of payment of the debt claimed by plaintiffs. It is insisted by plaintiffs' counsel, that this request is not properly in the bill of exceptions, but we think it is. It is in the body of the bill of exceptions, the fact of the request to charge it, is recited therein, and it immediately precedes that part of the charge which was excepted to by plaintiffs, and precedes the judge's signature. So that we think it is properly a part of the bill of exceptions, and if it is sound law the defendant was entitled to have the jury instructed as therein requested. But we suppose the circuit judge did not regard the proposition as law, and therefore refused to charge it.

Such a power, it would seem, should be vested either *virtute officeii* or by custom and usage in some of the officers of the bank for the convenient transaction of its business.

It is not a power conferred on the cashier. His duties are confined to the preservation and management of the funds of the bank, paying out and receiving debts, etc.: Sto. on Agency, sec. 114. But not to bind the bank by admissions and declarations: *Id.*, sec. 115.

In the absence of any different distribution of power by the charter, or by official action of the Board of Directors, it might well be rightfully exercised by general custom and usage, by the president.

But it does not appear from this record that the president of the bank had the inherent power as pres-

ident, to agree that the bank would not plead the statute of limitations to the claim set up against it.

In the recent work of Morawetz on Private Corporations, it is said, section 251: "The implied powers of the president of a corporation depend upon the nature of the company's business." It seems that a president has no greater power, by virtue of his office merely, than any other directors, and it is added, "that from his mere official station he has no more control over the corporate property than any other director," citing authorities. In the next section the author adds, that "presidents of corporations, by general custom, exercised much wider powers than those accorded to them by the authorities cited in the preceding section, and this custom has been judicially recognized." See also sections 253–4.

The instruction asked for was, therefore, correct, and it was error to refuse it, and in consequence, there was no error in the action of the court in granting a new trial, although for a different reason than the one which we hold was sufficient to authorize it.

At the next term of the court, upon precisely the same evidence, the issues were submitted to the judge without the intervention of a jury, and his Honor, as hereinbefore stated, held that the claim was due plaintiffs, and that it was within the power of the president, by the custom of the bank, to promise to pay it so as to arrest the running of the statute of limitations, and that plaintiffs would be entitled to recover, but for the fact that he was guarantor of the debt when the request for delay and promise were made,

and that said request and promise were made in New York and not at defendant's place of business, and for the reason of Daniel being guarantor and having made his request and promise in New York, his Honor found for defendant.

It is maintained by defendant that the president of the bank, Daniel, at the time he agreed not to plead the statute of limitation, and promised to pay plaintiffs' claim and contracted for delay to sue, was himself a guarantor for the debt due from defendant to plaintiffs, and was therefore disqualified to represent the bank, because of his adverse interest to the bank.

This adverse interest, if it exists, consists in the continuation of a liability on the bank for which Daniel was bound as guarantor, beyond the time to which the bank would be bound but for Daniel's promises.

It is a well established principle of law that agents cannot act so as to bind their principals, where they have an adverse interest: Sto. on Agency, secs. 210, 211. The principle is illustrated by examples, thus, an agent employed to sell cannot become the purchaser, nor can one employed to buy become the seller, nor indeed can the agent represent his principal in any transaction where he may derive a benefit at the expense of the principal out of the transaction, or where the interests of the agent and principal are antagonistic. And this is the principle underlying the numerous cases cited by defendant. And the question is, does it apply to the facts and circumstances of this case?

The defendant was largely indebted to plaintiffs and

others, and was in embarrassed circumstances. It sought indulgence of plaintiffs at a time when the plaintiffs were contemplating legal proceedings to collect their debt. In the course of negotiations plaintiffs said they did not want to let their debt run on until it would become barred, and Daniel then said no such defense should be made, that the debt was just and should be paid. The debt was at that time not barred by about two years, no new obligation was assumed in the way of increasing the liability of defendant, and correspondingly relieving Daniel. Defendant owed the same amount, and Daniel was just as much bound as guarantor after said agreement, as before. The admission of the justness of the debt, was in legal effect, just as much a waiver of the statute of limitations for six years thereafter, as an express promise to waive it. The delay was supposed to be for the benefit of the bank, and was solicited as a favor to it. If the money could have been then made, it would have been to Daniel's interest to have it then collected, and thus to have himself relieved from his collateral undertaking. His own liability continued unaffected by his promise. His promise was to pay a debt which he as president admitted was due, and which this record discloses was a just debt. Can the admission of an unquestionable fact, which did not in any way affect his own liability or promote his own interest, or wrong his principal, be held to place Daniel in a position of antagonism to his principal? If he had said to plaintiffs, I deny the justice of your claim, instead of admitting it, would he not have precipitated a suit

against defendant, the very thing it was seeking to avoid. The record does not disclose that the defendant is injured or Daniel benefitted by the delay to sue. They are in *statu quo*. Defendant still owes the debt and Daniel remains bound as guarantor. In respect to the debt due from defendant to plaintiffs, we think there was no such antagonistic interests of principal and agent, as disqualified Daniel from admitting the justness of the claim, and for the sake of delaying the bringing of a threatened suit, and thus averting the ruin of the bank's credit, to agree not to plead the statute of limitations.

We do not see that the case of *Stevenson* v. *Bay City* is like the present, and which is mainly relied on by defendant. In that case, McCormick, who was mayor of the city, was surety with others on an official bond. He, as mayor, was authorized to approve such bonds. But the court said: "Being himself a party to said bond he could not approve it, or represent the city by any official action in regard to it."

The result is, that we are of opinion that the judgment of his Honor, the circuit judge, upon the facts found by him, was erroneous.

It is likewise insisted for defendant, that the promises of the president of the bank could not bind it, because made in New York. The president was at that time away from Memphis and in a different State, attending to business of the bank, though he had not gone to New York especially to attend to the matter of plaintiffs claim.

There are doubtless many things that must be done

at the place of business of the bank, but we do not see that agreements and admissions that the debt was just, etc., might not as well be made in New York as in Memphis.

The finding of the facts by his Honor were correct, and well justified by the evidence, but as before stated, we think his conclusions of law were therefrom erroneous.

The result is, that the judgment of his Honor will be reversed, and a judgment will be rendered here in favor of plaintiffs against defendant for $8,161.50, with interest thereon from the 8th day of July, 1868, to this date, together with the costs of this court and the court below.

T. L. KENDRICK v. J. G. CISCO.

1. PARTNERSHIP. *Joint contractors. Evidence.* When D and C were sued jointly for provender sold D, on his individual credit to feed team used in carrying mail, he being the only party then known to the plaintiff as being concerned in carrying the mail, and C contended that he was not liable, and the plaintiff introduced in evidence a written contract between one S, who was the original contractor, and C and D upon its face showing that C was a joint contractor with D, and principal in carrying said mail, C insisting that in fact he was only surety for D, and that he was put as principal in the contract to enable him to draw the money simply for indemnifying himself as surety and for advances made by him to D. *Held*, it was error for the court to refuse to construe the contract and instruct the jury as to the meaning and legal import of same.

Kendrick v. Cisco.

2. SPECIAL CHARGE. When special instructions which were substantially correct as a proposition of law were asked, and the original charge did not contain any equivalent instructions, and there was testimony applicable to the charge requested, it was error to refuse the charge.

FROM MADISON.

Appeal in error from the Law Court at Jackson. T. C. MUSE, J.

McCORRY & BOND for Kendrick.

CAMPBELL & BROWN for Cisco.

COOKE, Sp. J., delivered the opinion of the court.

The plaintiff sued the defendant and one John G. Dodd before a justice of the peace, upon a matter of account, and recovered judgment against them jointly for about $67, and Cisco appealed to the Common Law and Chancery Court of Madison county, where a trial resulted in a verdict and judgment in favor of defendant, Cisco, and the plaintiff has appealed to this court. The Referees have reported that the judgment should be reversed and a new trial granted, to which the defendant has excepted. There is sufficient evidence in the record to sustain the verdict of the jury, and the cause will not be reversed except for error of the court, either in his charge or rulings during the trial.

The suit was for provender sold by the plaintiff to said Dodd to feed certain teams used in carrying the mails from Jackson to Lexington. The goods were sold and the credit given exclusively to Dodd, he being the

only party known to the plaintiff at the time as being concerned in carrying said mails and running said teams. But Cisco was sued jointly with Dodd upon the alleged ground that the plaintiff had subsequently ascertained that he was at the time either a partner or joint contractor with Dodd in the ownership of said teams and carrying said mails, and the provender having been purchased in and necessary for the carrying on of said business, the defendant, Cisco, was jointly liable with Dodd for the same. While it was contended upon one side that the defendant, Cisco, was such partner or joint contractor, and owner of said stock and contract for carrying said mails, it was insisted upon the other that the plaintiff's contention was not true, and that Cisco had no interest in or connection with the same except as the surety in fact of Dodd. That Dodd was the sole contractor, or rather sub-contractor, and Cisco having agreed to be his surety, Cisco's name, by an arrangement between all the parties, was put as principal in the contract to enable him to draw the money from the Government, which he was to do simply as a means of indemnifying himself against loss by reason of his being security for and advances made by him to said Dodd.

There was testimony adduced tending to sustain the theory of both parties, and in this stage of the trial the written contract between one Snodgrass, who was the original contractor with the Government for said mail route, and the defendant Cisco and Dodd, by which they became his sureties for his contract, and also obligated themselves to carry said mail upon said

route upon certain terms and conditions and for certain compensation specified therein, was introduced in evidence, manifestly for the purpose of showing the connection of Cisco with said contract and carrying said mail, and which upon its face did show that said Cisco was a joint contractor with said Dodd, and principal in carrying said mail.

The court was requested by the plaintiff to construe said contract and instruct the jury as to the meaning and legal import of the same. This the court refused to do, but permitted said contract to go to the jury unexplained along with the other evidence in the cause. This is assigned as error and the Referees have so reported.

It is true the action was not predicated upon this contract, but its terms were important evidence for the plaintiff in showing the just interest which the defendant Cisco, according to the theory of the plaintiff, had in said contract, and his joint liability with Dodd in carrying said mail and in said teams employed therein and to feed, which the plaintiff had supplied provender, and we think the plaintiff was entitled to have the same properly construed and its terms and meaning correctly explained to the jury, and it is easy to be seen how the court's refusal to do so may have prejudiced the plaintiff: 2 Par. on Contracts, 491–2, and note *b;* 12 Heis., 457.

At the conclusion of his general charge the court was requested by the plaintiff to charge the following propositions: "If you find from the evidence that plaintiff and defendant entered into a joint understand-

ing to carry the mail, and in doing so both of them were principals, and by agreement between themselves in order to accomplish a single end, for instance, to enable one of them, by his name appearing as a principal to draw money, this would make them jointly liable for all necessary supplies purchased by one of them for the joint enterprise; and this is so although they might not be technically designated as partners on account of a private agreement not to share profits. If they were principals in a joint undertaking they were jointly liable as to matters arising out of such joint business." This was refused by the court.

There was testimony tending to show by the terms of the contract itself and *aliunde*, that defendant Cisco and Dodd were joint contractors and principals in carrying said mail, and joint owners of the teams, etc., employed for that purpose, and that the plaintiff furnished said provender to feed said teams to Dodd upon his promise that he should be paid for the same out of the quarterly payments to be secured for carrying said mails, and that said provender was necessary for the feeding said stock. And that by an arrangement between defendant Cisco and Dodd, Cisco was to receive all the compensation due and for carrying said mails, but that this, as well as his connection with said contract was unknown to the plaintiff at the time he furnished said provender.

This testimony was applicable to the charge requested, and which, while it might be subject to some verbal criticism, is substantially correct as a proposition of law. The original charge did not contain any equiv-

alent instructions, and while there was other conflicting testimony tending to establish a different state of facts, yet we think the plaintiff was entitled to said charge and it was error to refuse it, and the Referees have so reported.

The exceptions to the report must, therefore, be disallowed, said report confirmed, and the judgment of the court below reversed and a new trial granted.

BOYD, MOSBY & CO. *v.* SALLIE M. HUNT *et al.*

TAXES. *Reassessment.* Where taxes have been declared void by reason of the illegality of the act authorizing them, they may be reassessed under act of 1873, chapter 40.

FROM TIPTON.

Appeal from the Chancery Court at Covington. H. J. LIVINGSTON, Ch.

LAUDERDALE, YOUNG & BLACKWELL and D. H. POSTON for complainants.

SANFORD and SIMONTON for defendants.

DEADERICK, C. J., delivered the opinion of the court.

In this case the land of defendant, Sallie M. Hunt, was sold for the payment of debts, and purchased by

another. A reference was made by the chancellor who rendered the decree, directing the master to ascertain if the land was liable for unpaid taxes. The master reported certain taxes due, amounting to $581.78, to State and county, but says he is inclined to think those of 1871 and 1872, included therein, are not a lien, upon the ground that Mrs. Sallie M. Hunt, then owner of the lands, united with Wallace and others in a bill against the county of Tipton, to enjoin the railroad taxes of those years amounting to $175, and that injunction, upon appeal, was made perpetual by the decree of the Supreme Court. In the meantime, Tipton county, by petition, was allowed to become a co-complainant in the cause for the purpose of maintaining the validity of the railroad taxes for those years.

This petition alleges that the county made a valid subscription of $200,000 to the stock of the Mississippi River Railroad Company, and directed a levy of taxes to meet the same. The bonds were issued by the county and delivered to the Railroad Company in July, 1869. It also charges that the said Sallie M. Hunt and others filed their bill enjoining the tax-collectors and county court from proceeding to collect taxes to pay said bonds, upon the ground that they were illegally issued, etc.

The county court and justices thereof, the tax-collectors, Hall and Walker, and the Railroad Company, were made defendants to this bill. The bondholders were not made parties. The Railroad Company disclaimed interest in the suit—having parted with the bonds, and the suit was dismissed as to it. Hall and

Walker, tax-collectors, answered, admitting they were tax-collectors, etc., and a judgment *pro confesso* was taken against the county.

Upon the hearing of the cause, which was entitled, R. H. Wallace and others against the County Court of Tipton county and others, this court decreed that the injunction granted restraining the county court of Tipton county, and defendants Hall and Walker, from collecting said railroad taxes, should be made perpetual.

By proceedings in the Federal Court by the bondholders, the county court was required to levy a tax to pay said bonds. The petition of the county of Tipton states also that the complainants in the suit of Wallace against the County of Tipton, refuse to pay the taxes assessed in 1869, 1871 and 1873, though other tax-payers were doing so or had paid them.

The petition avers that the decree of this court was void in said case of Wallace against Tipton county, because the bondholders who had had themselves made parties to it, afterwards had the same as to them, removed to the Federal Court, thus transfering to that court the whole cause, and the subsequent decrees of the chancery and this court were void for want of necessary parties, and for want of jurisdiction, the bondholders who were alone interested in the tax enjoined, not being before the court.

The petition shows that under the act of 1873, chapter 40, the county court had reassessed said taxes for 1869, 1871 and 1872, and prays to have said taxes retained out of proceeds of sales, etc. The proceedings of the county court are exhibited with the peti-

tion. Sallie M. Hunt and others, against whom the petition is filed, plead *res adjudicata* in various forms.

The question is presented whether the decree for the Wallace case perpetually enjoining the collection of said taxes, is a protection against being required in another proceeding by the county, to pay them, and the further question is presented whether the then reassessment for those years is authorized by the act of 1873?

The adjudication in the Wallace case was that the acts of 1867 and 1869 were unconstitutional, and that the bonds were illegally issued, and the taxes for their payment illegally assessed, and their collection was perpetually enjoined. This decree was rendered in a case between the county and Mrs. Hunt and other taxpayers, the bondholders being no parties thereto, and their rights being reserved in the decree.

Now, in this case between the county and Mrs. Hunt, the county seeks to have said taxes, either in virtue of the original assessment and levy, or by force of the new assessment under the act of 1873.

Assuming that the plea of *res adjudicata* could be successfully pleaded in this case, yet we are of opinion that the act of 1873 authorizes the reassessment made, and imposes on the land the liability for the tax thus reassessed. The acts of 1867 and 1869 were declared in the Wallace case inoperative and void, and it was under these acts the taxes were imposed. The taxes were declared void by reason of the illegality of the acts authorizing them, and in such case the act of 1873 authorizes a reassessment, and this has been regularly done by the county court.

It results that the taxes claimed were properly reassessed and are collectable, and the chancellor's decree will be reversed, and the taxes due will be paid out of the fund in the chancery court, and to this end the cause will be remanded for further orders and decrees. The costs of this court will also be paid out of said fund, and the costs below as may be adjudged by the chancellor.

T. H. ALLEN *et al. v.* B. F. KERR *et al.*

PRINTER'S FEES. *Costs.* Where publication of sale of land is ordered to be made in a daily newspaper, the presumption is that the advertisement is intended to appear in each edition of the paper until the day of sale unless otherwise ordered, and under Code, section 2150, printer's fee of 80 cents per square for the first insertion, and 40 cents per square for each subsequent insertion may be collected.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W. W. MCDOWELL, Ch.

WRIGHT, FOWLKS & WRIGHT for complainants.

E. L. BELCHER for defendants.

DEADERICK, C. J., delivered the opinion of the court.

The question in this case arises upon a motion in the court below to retax costs.

Land had been ordered to be sold, and the decree directed that the clerk and master should sell the land, "after giving twenty days' notice of the time and place of sale in one of the Memphis newspapers." The land was advertised for twenty consecutive days in the "Avalanche," a daily newspaper published in Memphis, and a bill for $18 presented and paid by the clerk and master.

The chancellor held that under section 4585 of the Code, the printer was entitled to but $3, and required the master to retain $15 out of any money in his hands belonging to him, and refund same to complainant.

The publishers being made parties to the suit were allowed an appeal to this court. They insist that under sections 2145*a* and 2150, the number of insertions is not restricted, and that the fee of $3 allowed under section 4585 is for a single insertion.

Section 2145*a* provides that the person selling, unless restricted in the order, shall publish the sale "at least three different times."

This language would seem to imply that the clerk might order the publication to be made even oftener than "three times."

Section 2150 allows a printer's fee of 80 cents per square for the first insertion, and 40 cents per square for each subsequent insertion, without any restriction as to the number of insertions. The Referees held that under the several sections of the Code cited, the publication might be made daily, unless restricted by the order. The master reported the sale, and that

the land was advertised as required by the decree, and the report was approved and confirmed. Where the publication is ordered in a daily paper the presumption would be that it was intended the advertisement should be published until day of sale in each edition of the paper, unless otherwise directed. It is easy to regulate the number of insertions in the order if it is desired to restrict. The services were performed upon an implied contract to pay for them, and the rates charged it is said at 80 cents and 40 cents per square would be greater than the aggregate charge.

The Referees have reported in favor of reversing the ruling of the chancellor, and we confirm their report.

JOHN L. FITZHUGH *v.* THE STATE.

1. CRIMINAL LAW. *Practice.* Where the record shows that fourteen grand jurors were appointed at the term at which the indictment was found, and no notice of the irregularity was taken in the court below, it is too late to make such objection in the Supreme Court.

2. SAME. *Oath of the jury.* Where in a trial for murder, the record after reciting the defendant plead not guilty, joinder of issue and the names of the jurors polled, "who were elected, empaneled and sworn to well and truly try the issues joined," and does not contain the common law form of "well and truly try and true deliverance make," etc. *Held*, that while it is best that the long established and recognized forms should be observed, the record was sufficient.

3. SAME. *Evidence.* The general character of the deceased being in issue, it was not error for the court to exclude what the witness had heard of particular acts upon which collateral issues might arise.

4. SAME. *Evidence.* Threats and menacing and provoking language by deceased to defendant if communicated, are allowed to show the *animus* of the deceased and the state of mind of defendant towards the deceased.

5. SAME. *Evidence.* The character of the deceased for violence should be considered in determining whether by overt act of the deceased the defendant had just apprehension of reasonable danger.

6. PRACTICE IN SUPREME COURT. To reverse a judgment upon the ground that the evidence does not sustain the verdict, there should be preponderance against it.

FROM DYER.

Appeal in error from the Circuit Court of Dyer county. J. T. CARTHELL, J.

T. E. RICHARDSON for Fitzhugh.

ATTORNEY-GENERAL LEA for the State.

DEADERICK, C. J., delivered the opinion of the court.

Plaintiff in error was convicted of murder in the second degree in the circuit court of Dyer county, in killing John Powers, and has appealed in error to this court.

It is maintained in an elaborate and able argument by his counsel, that the judgment should be reversed for errors of law committed in the progress of the trial, as well as because the evidence does not justify the verdict. It is objected that the record shows that fourteen grand jurors were appointed at the term at which the indictment was found. Apparently this is

so, but it is probably a clerical mistake, if not no notice seems to have been taken of this irregularity in the court below, and it is too late to make such objection, in this court, for the first time.

Exception is also taken in this court to the form of the oath administered to the jury in the trial of the cause. The entry of the record is: "Comes the attorney-general on behalf of the State, and the defendant, John L. Fitzhugh, who pleads 'not guilty' and puts himself on the country for his trial, and the attorney-general doth the like, whereupon comes a jury, etc., who were elected, empaneled and sworn *to well and truly try the issues joined.*" The objection is that the common law form of "well and truly try and true deliverance make," etc., was not used. Although we think it is best that long established and recognized forms in such cases should be observed, yet the jury in this case were charged with the trial of the single issue made of guilty or not guilty, and this sufficiently and distinctly appears of record.

Frank Perry testified that he knew Powers, the deceased, very well, lived five miles from him, and his reputation was good where he (witness) lived. On cross-examination by defendant he said he could not give the name of any one who had spoken of him as a peaceable man. That he had only heard him spoken of as a peaceable man since his death. Defendant's counsel also asked witness if he had heard that Powers had shot his own son-in-law, to which he answered "yes." He was also asked if he had heard that Powers was hiding or living away from his family.

The court here interposed and said no inquiries must be made as to any particular matter of conduct.

It is insisted that the court erred in rejecting the evidence as to particular matters of which witness had heard, and also in refusing to exclude so much of witness' statement as details that he had only heard Powers spoken of as a peaceable man since his death.

We are of opinion that there was no error in excluding what the witness had heard of particular acts, and this we understand to have been the ruling of the court: 6 Baxt., 465. The inquiry was as to the general character of deceased, not as to hearsay evidence of facts of particular acts, upon which collatteral issue might arise. But even if the testimony in chief as to this general character might have been excluded by the court, yet the court upon the cross-examination might well leave the matter of the value of the testimony to be determined by the jury: 1 Greenl. Ev., sec. 461.

It is further insisted that the court erred in its instructions to the jury in respect to the threats made by deceased against defendant. The court said to the jury: "Previous threats made by deceased against the prisoner and communicated to him before the difficulty, should be considered by the jury to understand the state of mind of the prisoner and the apprehension of danger under which he acted, and to explain his conduct at the time of the difficulty in connection with the other evidence and circumstances of the case." And the court adds: "If the testimony shows that

the deceased used insulting and provoking language about the defendant, and if it was communicated to him, or addressed directly to him before the difficulty, you consider that in ascertaining his state of mind and feeling towards the deceased."

In respect to the first part of the charge above quoted, it is almost in the exact language of this court in the case of *Little* v. *The State*, 6 Baxt., 494. And the subsequent part of the charge applies the same rule as to insulting and provoking language, and instructed the jury that they might consider that as well as threats in ascertaining defendant's state of mind towards deceased.

In this we think there is no error. This language and conduct was admitted as showing the *animus* of the deceased, and it was also to be considered with the other evidence, including the threats, in ascertaining the state of mind of defendant towards the deceased. Menacing and provoking language are likely to produce similar influences, and we cannot see that any prejudice to defendant could result from the charge as given.

The defendant requested the court to charge the jury "that the character of the deceased for violence should also be taken into consideration and weighed by the jury, in determining by whom the difficulty was sought and brought about, and also to the motives and purposes of the deceased when he met the defendant." The court declined to so charge upon the ground that he had already sufficiently charged upon the proposition submitted.

The court had charged the jury that "the character of the deceased for violence, as well as his animosity to defendant as indicated by words and acts at the time and before the difficulty, as well as the attitude of the parties, their relative strength and how they were armed, are all proper matters for the consideration of the jury in determining the question of reasonable apprehension of danger," etc. The court had also instructed the jury that to constitute reasonable apprehension of danger, there must be some words or acts, or demonstrations of some kind by deceased at the time of the killing, indicating a present purpose to do the injury. So that, in effect, the court did instruct the jury as requested, that the character for violence, etc., of deceased, should be considered in determining whether by overt act, etc., deceased had justified apprehension of reasonable danger, and thus began the conflict.

There was evidence of a number of serious threats by deceased against defendant—some of which were communicated. The testimony of several witnesses shows that he was a violent and dangerous man, and more powerful than defendant.

There are some other exceptions presented in argument, but we do not think there is any substance in those not specially mentioned.

The jury have returned a verdict of guilty, and it is insisted that this verdict is not warranted by the evidence. The facts are not very distinctly presented, but there is enough in the record to show that the parties met in the road; defendant on horseback and

deceased afoot; that defendant fired two shots before he dismounted—deceased not then being in sight of the witness, and probably not near enough to defendant to strike or offer to strike, with his walking-stick, which it appears was his only weapon. After defendant dismounted both are seen leaving the road, some distance apart—probably fifteen feet or more. After they got in the woods a third shot was fired, and witnesses heard a scream or groan; two other shots were afterwards heard, and Powers found dying with two wounds, both showing appearence of being powder burned. Davenport states that deceased face was towards his (witness') house, and defendant moved around between deceased and the house; that the parties passed out of his sight behind some trees before the third shot, and that it was a little while after the firing of the first two, and the subsequent shots.

Powers' stick was found broken in the woods, but it does not appear that defendant was struck or bore any marks of having been struck with it or other weapon.

It is pretty clear that deceased could not have been very near defendant when the first two shots were fired, as he was not seen until after defendant had dismounted, after firing the first two shots. From the facts disclosed it is probable that the deceased, being unarmed, except with his stick, did not seek to make any assault upon his well armed adversary, but sought the woods to avoid it, and it is certain that defendant left the road, and Davenport says defendant moved round between deceased and his (witness') house.

To reverse a judgment upon the ground that the evidence does not sustain the verdict, there should be a preponderance of evidence against it, but in this case we are of opinion that the preponderance of evidence is in favor of the verdict.

The defendant has had a fair trial upon a full and correct charge upon all the material questions arising in the case, and the judgment must be affirmed.

PETITION TO REHEAR.

Upon petition to rehear, DEADERICK, C. J., delivered the following opinion:

An application to rehear has been presented in this case on behalf of the plaintiff in error, against whom a judgment was affirmed at a former day of this court, upon a conviction of murder in the second degree.

The ground principally relied on for a rehearing and reversal of the judgment is, that the jury was not sworn according to law.

The form of the oath to be taken by jurors in the trial of criminal cases, is not prescribed by statute in this State. The proper and regular form, and that usually administered is the common law form, and as stated in the original opinion in this case, we think it is best that long established and well recognized forms should be observed and adhered to. The record in this case recites that the jury were "elected, empaneled and sworn, to well and truly try the issue joined."

Counsel for plaintiff in error has furnished us with cases determined by the courts of last resort in Texas, Arkansas and Alabama, which do hold that under their statutes the oaths of the jurors must be in the language thereof, and if it appears that the language of the oath was "to say the truth in the premises," or "to try the issue joined," the judgment would be reversed for this error: 2 English (Ark.), 59; 5 Eng., 540; 1 Texas, 408; 60 Ala., 2; 47 Ala., 31.

More recent cases in the Alabama court have overruled the earlier cases; and it has been held by that court that the omission of the words "a true verdict to render according to the evidence," which are prescribed by the statute, will not vitiate the verdict: *Atkins* v. *The State*, 60 Ala., 45.

In Thompson & Merriam on Juries, it is said, if the oath administered differs materially from that prescribed by statute, it will be error: Sec. 299.

But if it is recited that the jury was duly sworn, it will be presumed that the proper oath was administered, and it is added that it may be questioned whether a recital that the jury was "sworn well and truly to try the issue joined between the State and defendant," should be regarded as an attempt to set out the oath actually administered: Sec. 299.

The swearing of the jury is always done in the presence and hearing of the defendant and his counsel. If the oath was not properly administered in fact, it would seem, from the character of the irregularity, that the proper practice would be, in analogy to our practice, in requiring irregularities in the em-

paneling of a jury known to defendant and his counsel to be excepted to at the time of their occurrence.

In same book on Juries it is said: "It is too late, after verdict, for a party to object to the form of an oath administered for the first time. He is not permitted to take the chances of a favorable verdict, and make his objection subsequently": Sec. 275. And the authors quote Chief Justice Shaw as saying, "if a party knows of any prejudice entertained by a juror, and makes no exception when the jury is empaneled, however good the cause of challenge, it must be deemed to be waived," otherwise knowing of a secret taint to which the verdict may be exposed, he takes his chance of a favorable verdict, reserving a power to impeach it if against him.

This we regard as sound law, and in principle equally applicable to an infirmity attaching to the whole jury, as in cases where the objection lies to one or more, less than all.

Whether, therefore, we consider the record as purporting to set out the oath as administered, or as a recital only of the fact that the jury was sworn to try the issues, we are of opinion, the fact of the form of the oath being known to counsel and to defendant, it eannot now be objected, for the first time, that it was insufficient in form. We do not consider the objection as going to the merits. If it be conceded that the record purports to set out the oath that was administered, it commits to the jury the trial of the issue made between the State and the defendant, of "guilty or not guilty." Upon this issue they

were fully instructed by the court as to their duty, and responded by their verdict fully to the issue committed to them, and thus have done all the law required of them, if they had been sworn in the most formal manner.

Regarding the objection as technical and formal, and being satisfied with the correctness of the verdict and judgment, we are all of opinion that the rehearing should be refused and judgment rendered here in affirmance of the judgment below.

THE STATE v. J. R. GODWIN.

JUROR. *When exempt.* A party who has regularly served as juror during a term of the circuit court of Shelby county, cannot be compelled to serve another term within twelve months (or the time prescribed by statute), in the criminal court of the city and county.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. J. M. GREER, J.

ATTORNEY-GENERAL LEA for the State.

GEORGE GANTT for Godwin.

FREEMAN, J., delivered the opinion of the court.

This case presents only one question for decision,

that is, whether a party who has regularly served during a term of the circuit court of Shelby county, can be compelled to serve another term within twelve months, or the time prescribed by statute, in the criminal court of the city and county.

It appears that the parties who are desired as jurors are summoned in the criminal court of Shelby county by a writ issued by the judge of that court. We have not the law before us, but is done in pursuance of proper authority.

For the circuit court, ch. 5, of Code, sec. 3981, the county court of each county is required at the first session after each term of the circuit court, to designate twenty-five good and lawful men to serve as jurymen at the next succeeding court. This act was amended by act of 1883, so as to provide that this shall be done by the county court at its quarterly term next preceding each term of the circuit court, provided that no person shall be summoned who has served on a venire for a period of two succeding years.

These sections serve to show the policy of the Legislature on this question. By section 3998, "no court shall appoint any person to serve as a juror more than one time in each period of twelve months, either on the original panel or to fill a vacancy therein." This is in the chapter entitled, "Of Jurors and Juries," and while the provisions refer generally to the county court, because the practice was then to summon by the agency of that court alone, no reason is seen why this general provision should not control other courts

when the power is confided to them by statute passed afterwards. By section 3989, it is provided "and should any juror in violation of the above provisions be appointed, the court shall discharge him, and appoint a juror in his stead free from exception. The result is, that the juror was entitled in this case to exemption under the provisions cited, and was entitled on his request to be discharged, and the court erred in inflicting the fine of $25.

The judgment will be reversed and the defendant discharged, with costs.

R. H. ANDERSON & CO. *v.* THOMAS and JOHN INGRAM.

REGISTRATION. Where at sheriff's sale of land under execution the plaintiff in execution purchased, and the defendant in execution procured G to redeem the land or to purchase it and give him longer time to redeem, and after the time for redemption had expired, the sheriff and the defendant in execution made deed to G, and G voluntarily executed an instrument agreeing to convey the land to defendant in execution whenever he should pay G what he owed him. *Held*, that said promise or agreement was not such contract for sale of land as vested title or required registration.

FROM MADISON.

Appeal from the Chancery Court at Jackson. T. C. MUSE, J.

McCORRY & BOND for complainants.

R. W. HAYNES for defendants.

DEADERICK, C. J., delivered the opinion of the court.

The bill was filed March 7, 1882, by complainants, as judgment creditors of defendant, John Ingram, with a return of *nulla bona* on execution issued. They seek to subject certain personalty conveyed in trust, January, 1877, to Thomas by John Ingram, and to hold Thomas liable for waste and mismanagement of the property conveyed in trust. They also allege that John is the owner of an undivided one-fourth interest in a tract of 2,600 acres of land situate in Madison county, and described in the bill, and complainants seek to subject this interest to the satisfaction of the judgment.

The chancellor, upon answer of defendants, depositions and documentary evidence introduced, dismissed the bill so far as relief was sought against Thomas Ingram, and ordered an account as against John, and complainants have appealed. The referees have recommended an affirmance of the chancellor's decree, and complainants have filed numerous exceptions, raising again the questions maintained in their bill.

Soon after the execution of the trust deed by John, Holland and Wilbon obtained a judgment against John for $450, and his interest in said land was sold for its satisfaction in May, 1877, and the land was bid in by the creditors at the amount of the judgment and costs.

In the meantime no steps were taken by Thomas, as trustee, nor by any of the beneficiaries in the trust deed for the sale of any of the property conveyed

therein. It consisted of mules, hogs, horses, corn, and cotton of the product of the year 1876. The deed provided that if the debts therein secured were paid by January 1, 1878, it should be void, otherwise it should remain in full force. But it contained no authority to the trustee to take the property into his possession, nor to sell the same, and we think, as the chancellor and the Referees have found, that the trustee named therein, absolutely refused to have any thing to do with the execution of said trust. The result was that nearly all the property therein conveyed, was wasted or had died, or been disposed of before any of the beneficiaries took any steps to have it applied to the purposes of the trust.

The complainants, as far as appears, were the first to make any effort to this end, and their bill was filed more than five years after the execution of the deed of trust. Thomas was a large creditor of his brother, John, and was one of the beneficiaries in the deed. After the purchase of the land by Holland and Wilbon, and a few months before the expiration of the time of redemption, John Ingram procured John A. Greer to redeem the land, or to purchase it of Holland and Wilbon, and give him some longer time to redeem. Holland and Wilbon executed a deed, or assignment of their bid and interest in the land to Greer, acknowledging the receipt from him of the amount of their debt, and directed the sheriff to make the deed to him.

This deed was executed to Greer by the sheriff on December 5, 1881, more than eighteen months after

the time of redemption had expired, and the said John Ingram united in this sheriff's deed to Greer, conveying his interest in the land, and acknowledging that he had failed to redeem said land within the time allowed by law or otherwise, and in consequence of such failure to redeem, the title of said Greer has become absolute.

Two days after the execution of this deed Greer voluntarily executed an instrument, in which it is recited, that he has a deed for John Ingram's land, and that he, Ingram, is indebted to him in the sum of $1,053.83, and agrees to convey to him said land whenever he pays him, Greer, or causes to be paid to him, said sum. This instrument is dated December, 7, 1881.

On March 2, 1882, Greer, at the instance of said John Ingram, conveyed to Thomas Ingram the said land, for the consideration of the payment by said Thomas by John's indebtedness to Greer, and for the further consideration of the surrender by Thomas to John of about $2,400 of notes due from John to Thomas. The said John at that time also surrendering to Greer the agreement he had signed allowing him the privilege to repurchase the land, and a quit-claim deed, as it is styled, was also prepared and signed of John to Thomas. The deed of Greer to Thomas was registered the same day it was executed, but the quit-claim deed from John to Thomas was not registered until March 8, 1882, the day after the filing of complainant's bill.

Unquestionably Greer had the title to the land free

from any equity or claim of John Ingram after he had united with the sheriff in the conveyance to him. His promise or agreement to reconvey upon receiving so much money, was made after the right of redemption had expired. It created in John no interest in the land, but merely gave him the privilege of repurchasing, by the voluntary act of Greer, so that it was not such a contract for the sale of the land as vested any title, or required registration. But it might be abandoned or changed by the parol agreement of the parties. It was so abandoned, and with the assent of John, and for a valuable consideration to him, the title was conveyed to Thomas. Thomas paid Greer $1,178, the amount of John's indebtedness to him, for which the land had become liable, and also surrendered to John evidences of indebtedness against him, amounting to more than $2,400. These debts against John are shown to have been valid, and the land is shown not to have been worth more than $3,000, and all the circumstances indicate that all these transactions were in good faith and free from fraud.

We are of opinion, therefore, that the exceptions to the report of the Referees are not well taken, and should be set aside, and the chancellor's decree affirmed and the cause remanded for account and further proceedings, and complainants will pay the costs of this court.

IKE ATCHISON v. THE STATE.

1. CRIMINAL LAW. *Misdemeanors. Punishment.* All misdemeanors, where the punishment is not prescribed by statute, are punishable by fine or imprisonment or both, within the limits fixed by law, as the court may in its discretion determine.

2. PLEADINGS AND PRACTICE. *Court may state testimony to jury.* The court has the right to state the testimony of a witness to the jury upon their request.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. J. M. GREER, J.

T. W. BROWN for Atchison.

ATTORNEY-GENERAL LEA for the State.

COOKE, Sp. J., delivered the opinion of the court.

The defendant was indicted and convicted of unlawful gaming. The indictment contained two counts, one under section 4871, of the Code, for encouraging, promoting, aiding and assisting in the playing a game of hazard, called poker, for money, etc., bet upon said game. The other count was under section 4872, for permitting persons in a house under his control, to play at a game of hazard, called poker, for money, etc.

The first of said offenses is simply made a misdemeanor by the statute, without any special punishment attached to it. The second is also made a misdemeanor

punished by a fine of not less than fifty dollars, nor more than five hundred dollars, or imprisonment in the county jail not exceeding one year, or both fine and imprisonment within these limits.

The jury found a general verdict of guilty, and the court fined the defendant fifty dollars and sentenced him to imprisonment for one month. The defendant moved for a new trial, and as the record states, in arrest of judgment, though no reasons why the judgment should be arrested, were either filed or entered of record. The court refused a new trial and defendant appealed.

It is insisted for the defendant, that as the verdict was general, and as there is no specific penalty annexed by the statute to the offense of promoting or encouraging gaming, the court had no power to impose imprisonment for that offense, and hence, the judgment should be reversed. There is nothing in this position. All misdemeanors, where the punishment is not prescribed by statute are punishable by fine or imprisonment, or both according to the nature of the offense: 1 Rus. on Crimes, 45. And this where not otherwise provided, is left in the discretion of the court, within the limits fixed by law.

The attorney of the defendant prayed an appeal and tendered a bill of exception, which the court refused to sign, because as he states, it was not a correct bill of exceptions, and contained very little of what occurred upon the trial, and thereupon his Honor made out and signed a bill of exceptions himself, which he certifies to contain a true statement of what occurred

on the trial, and to which the defendant excepted. Whether the court is bound to sign any bill of exceptions, until a correct one is made out and tentered to him by the party appealing, does not arise in this case, as he voluntarily undertook to do so. As is shown by the bill of exceptions made out and signed by the court, and to which the defendant excepted, the State after having examined two witnesses, introduced one Hacket, who testified that he was a member of the police force of the city of Memphis, and that on a certain night he made a descent on a certain room in Memphis, where he suspected gaming, and then the bill of exceptions proceeds: "Witness described the room and time so as to show that it was the same night and the same room referred to by the preceding witnesses, and then proceeds to give the testimony of the witness as to what transpired in said room, etc."

This was not giving the testimony of the witness but the deductions which the judge drew from it, and as this was not agreed to by the defendant, we think it should have contained the statements of the witness, as it was material to show it was the same room and at the same time, in regard to which the other witnesses had testified, and hence, we can see that the bill of exceptions, as made out by the court, was imperfect in this respect. But as no specific exception was taken to this part of the bill of exceptions, nor the attention of the court called to it, we do not think the defendant can avail himself of it now when made for the first time.

In another part of the testimony of this witness, the bill of exceptions sets out his testimony as follows: "The witness said on examination in chief, that the room was that of defendant." This witness, under cross-examination as to his statement "that it was the room of the defendant, stated that of his own knowledge, he could not say that it was the room of the defendant; but that he arrested the defendant for keeping a gaming room or house, and entered such charge against him at the station house, and that defendant told him it was his (defendant's) room. That he also told him, he, defendant, had only a few of his friends up there for amusement. He did this as if interceding for his friends—the persons arrested with him in the room, and the defendant went with him."

After the jury had received the charge of the court and retired, in about half an hour they returned into court, and through their foreman said they had come into court to ask the court what was Capt. Hacket's testimony about the defendant having told him it was his room, and went on to say one of the jury did not remember Capt. Hacket's evidence, and wished the court to state it. Thereupon the court said: "Capt. Hacket, on his direct examination, said that it was defendant's room. That on cross-examination he had said that he knew it was defendant's room, because at the time of arrest defendant had told him so. That defendant had submitted to arrest cheerfully, that he had asked him to let the others off, that they had merely come to his room for a little amusement." Here the counsel for the defendant interrupted the court and

commenced himself to tell what Hacket had said, when he was stopped by the court, and to this action defendant excepted.

We do not see the force of this objection. The court had the right to state the testimony of the witness to the jury upon their request that he should do so, and the record shows and stated it substantially as the witness had stated, and the court's action in not permitting the defendant's counsel to give them his version of it, after he had argued the case, was eminently proper.

A great many other exceptions were taken to the action of the court by the defendant, which we deem it unneccessary to notice, as there is nothing in them which entitles the defendant to a new trial.

The bill of exceptions which was tendered by the defendant's counsel, and which the court refused to sign as a bill of exceptions, but which he did sign for the purpose of showing that it had been tendered to him, and which he advised the clerk to copy in making out the transcript is contained in it. But as it does not constitute any part of the bill of exceptions, we cannot take any notice of it.

We find no reversible error in the record, and therefore affirm the judgment.

LOUISVILLE & NASHVILLE RAILROAD COMPANY v. PETER MCKENNA and WIFE.

1. PLEADINGS AND PRACTICE AT LAW. *Evidence. Written instrument Construction.* The general rule in this State is that the construction of a written instrument introduced as evidence, if complete and intelligible in itself, is matter of law for the court, expert testimony being admissible in proper cases to aid the court in reading the instrument.

2. RAILROADS. *Orders.* An accident having occurred on a railroad by means of an obstruction put on the road-way by an unknown third person at a particular trestle in mile 60, the superintendent issued a written order to the employes of the passenger trains to slow up, run carefully, and keep a sharp lookout at mile 60, and while the order was still being acted on another accident occurred from a similar obstruction at the same trestle, by which the plaintiff was injured. *Held,* that the order required the engineer to slow up enough to stop the train on short notice when the emergency did arise, and the court properly instructed the jury to that effect.

3. SAME. *Malicious obstruction.* The duty of railroad companies in cases of malicious obstruction considered.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

ESTES & ELLETT for Railroad.

W. H. CARROLL and C. W. HEISKELL for McKenna.

COOPER, J., delivered the opinion of the court.

The McKennas recovered judgment against the railroad company for injuries to the wife as a passenger

on the company's train, occasioned by the cars being thrown from the track by an obstruction put thereon by an unknown person. Upon the appeal in error of the company, the Referees report in favor of affirmance. The company except to the report, their exceptions going to the law of the charge.

The accident occurred to a regular passenger train at a trestle on mile 60 of the road, about half after five o'clock in the morning of November 12, 1873. The obstruction was caused by placing a T rail diagonally across the track about midway of a trestle, one end being under the South rail of the road-way and the other end resting on the North rail, and braced on both sides by cross-ties. The proof is conflicting as to whether the morning was clear, or dark, cloudy and foggy. The engineer saw the obstruction about seventy-five or eighty feet before the train struck it. The train was moving at between eight and ten miles an hour, the air-brakes having been applied, and the speed of the train slackened before reaching the trestle in obedience to an order of the superintendent, which was to slow up, run carefully and keep a sharp look-out at mile 60. This order of the superintendent had been given because six weeks before that time a similar accident had occurred at the same trestle. And the employes admit that they were acting on the order as still in force. The instruction of the trial judge to the jury complained of related to the duty of the engineer, in consequence of the order mentioned.

The charge objected to is: "But if the evidence shows that the obstruction was put on the track by

a stranger, and further shows that by reason of a previous accident at the same place from a similar cause a short time before, the engineer had been warned to 'slow up' when approaching this trestle, and to keep a sharp lookout ahead, and he failed in either of these duties, or failed to slow up enough to stop his train on short notice when it was possible for him to do so; in other words, failed to prepare as fully as possible for the emergency which he was warned might arise at the place of the accident, and by reason of such failure was unprepared to stop quickly his train when the emergency did arise of which he had been forewarned, and the accident occurred by reason of such failure, I charge you to find for the plaintiff."

The company requested the court to add to the charge quoted above the following qualification: "But if you believe from the testimony that the order to slow up and keep a sharp lookout meant that the engineer should reduce the speed of the train to ten, fifteen or twenty miles per hour; or if you believe from the testimony that the order in this case was to reduce the speed of the train to ten or fifteen miles an hour, and keep a sharp lookout, and that the engineer obeyed the order, then the defendant would not be liable, although the engineer did not reduce his speed to a point below the order, so as fully to prepare for the emergency that actually occurred."

The company also requested the trial judge to give the following instruction: "If the jury believe that said order was a proper and prudent order and regulation for the running of the passenger train at the

time and place of said accident, and that the same was properly obeyed by the engineer in its true sense and meaning by slowing up to a speed not exceeding ten miles an hour, running carefully and keeping a sharp lookout at the time and place of the accident; and further, that the accident was occasioned by an obstruction maliciously placed on the track by some third person unknown, and that the same was seen by the engineer as soon as it was possible to see it, and that then every means in his power were promptly used to prevent an accident, the jury should find for the defendant. It was not, as a question of law, the duty of the engineer, in the circumstances supposed, to stop whenever he approached the space covered by said order, or to reduce the speed of his train so that it could be instantly stopped at any moment while passing over said space. But it is for the jury to say from the evidence whether what was done by the engineer was sufficient to relieve the company from the slightest imputation of negligence." These requests were refused.

The Referees say: "On the part of the plaintiffs in error, it is insisted that negligence in reference to the failure to slow up could only be predicated of disobedience to the order, and inasmuch as the plaintiffs in error proved that to 'slow up' in railroad orders meant to reduce speed to ten, fifteen or twenty miles per hour, that the charge of the judge, imposing upon the engineer a duty far more stringent than the order, was erroneous. This objection undertakes to limit the issue to the letter of the order. The charge was cor-

rect. If they in whose employment the engineer was, for any reasons satisfactory to themselves, anticipated an accident at a given point, or gave special instructions for care at a given point, in consequence of past or apprehended accidents, so as to bring home to him notice of the necessity of extra precaution at the place indicated, it is not error to charge that his precautions must be such as might arrest an anticipated danger, although they exceeded the letter of his order from the company. For under the circumstances producing, and as now appears justifying the order, it was the proper duty of the company not only to issue an order for such precaution, but it was equally its duty through the engineer, to enforce it in its full spirit and intent, the avoidance of the danger feared, by taking such control of the train by the use of brakes, slackening speed, etc., as would effectuate the object intended, and enable him to stop the train on short notice."

It is not contended that the mere fact that a similar accident had occurred at the same place, six weeks before, would of itself impose upon the railroad company any particular duty in running its trains over that part of the road. There is no presumption that because an obstruction has been maliciously put upon the track of a railroad at one place, a similar obstruction will afterwards be put at the same place, or for that matter on any other part of the road. The law never presumes the occurrence, much less the recurrence of an illegal act, and human experience would scarcely sustain the conclusion that the same crime will be repeated in the same place. While this pre-

cise point seems never to have passed into judgment, it has been held that a railway company is not liable for an injury inflicted by a stray dog at their station, although a few hours before it had there bitten another person, if it was then driven away: *Smith* v. *Great Eastern Railroad Company*, L. R., 2 C. P., 1. It must be left to the railroad company to determine what directions, if any, it will give its employes under the circumstances of the particular case, under the usual rule which regulates the duties of the company to the public. If the company undertakes to give special instructions to its employes at the time, these instructions must be the measure of the action of the employes. All that they can be required to do is to obey the instructions in their "full spirit and intent." No reason occurs why, merely because instructions are given, the employes should be required, in addition to obeying them, to take every other precaution necessary to avert an accident. The only question in such case would be whether the instructions were reasonable and proper. If, therefore, his Honor, the trial judge, intended to charge, and the Referees intended to report that, under the order in question, the engineer was bound to go beyond the instructions, and adopt such precautions, although not included in the order, as would be necessary to avert the danger of a similar accident to the one that had occurred, they were in error.

It is altogether another question, however, whether the order actually given did not require the employes to do all that the trial judge instructed the jury should have

been done. The company, in view of its knowledge of all the facts touching an accident and its duty to the public, may be required to give orders, or may give them, in which event the duty of the employe is to obey in "letter and spirit," and a failure to do so would be negligence for which the company would be responsible. We can easily conceive of cases where the company may have knowledge or good reason to believe that another obstruction would be put upon the road. In that event it would be its duty to order the train not only to slow up, but to be brought to a full stop, and the track examined before proceeding. And generally where circumstances demand precautionary measures they must be taken, and the law requires a degree of care proportioned to the risk. The company did give the order which is deposed to by the witnesses, with special reference to the previous accident, and the employes were acting under it. We do not understand the trial judge to tell the jury they must go beyond the order. He merely puts a construction upon that order, and undertakes to define the duties of the employes under it.

The contention of the company was that the words "slow up" have a definite meaning in railroad parlance, and signify that the rate of speed of the train should be reduced to ten, fifteen or twenty miles an hour, and testimony was introduced to that effect. And no doubt the reduction of the usual rate of speed of a passenger train to either of the number of miles mentioned, would be a slowing up in a general sense, and of course, in the usual acceptation of the words.

But his Honor's idea is that the phrase means something more when used in an order intended for a particular purpose, and based upon the possibility that an accident from a malicious obstruction may occur at the designated place, because a similar accident from the same cause had recently occurred. In that view, he thinks the company meant that the engineer must so slow up as to be able, if by a sharp lookout he saw that there was such an obstruction, to stop the train in time to prevent a similar accident to the one that had already occurred. It would be useless, he thinks, to make the order unless it was intended to be operative so long as it remains in force. The particular instruction is obscured by the use of the disjunctive "or" instead of the explanatory phrase "that is," or words of like purport. The clause which follows the disjunctive particle is really an explanation of what his Honor considers would be a failure of the duties to slow up and keep a sharp lookout. He says, in substance, that the company would be liable if, because of a former accident at the same place from a similar cause, a short time before, the engineer had been warned to slow up when approaching the trestle, and to keep a sharp lookout ahead, and he failed in these duties, and it would be a failure of these duties if he neglected to slow up enough to stop his train on short notice. Unless this is his Honor's meaning, he has not construed the order, and he has certainly not left it to the jury to put their own construction upon it in connection with the testimony. In this view, the real

points of contest are whether the judge had the right to construe the order, and did correctly construe it.

The general rule in this State undoubtedly is that the construction of a written instrument introduced in evidence, if complete and intelligible in itself, is matter of law for the court: *Bedford* v. *Flowers*, 11 Hum., 242. And it is also the general rule that where the facts are ascertained, even in the case of parol testimony, the court declares the law: *Gregory* v. *Underhill*, 6 Lea, 207, 211. The testimony of experts is, of course, admissible in proper cases, to aid the court in reading the instrument: 1 Greenl. Ev., sec. 280. The expert testimony in this case only tends to show what the words themselves fairly import, that to "slow up" a train means to diminish its speed, the extent of the diminution being necessarily controlled by the object or purpose had in view. To "slow up" in any given case must be such a slowing up as the particular exigency requires. To slow up and keep a sharp lookout for an expected or possible obstruction must mean such slowing up and watchfulness as will prevent the accident, the order being otherwise of no avail. And so the trial judge properly thought and charged. The instructions asked for by the plaintiffs in error were based upon a different theory, and were properly refused.

The exceptions to the report of the referees will be disallowed, and the judgment below affirmed.

COOKE, Sp. J., dissents.

M. O. HENDERSON v. DENNIS DONOVAN.

SALE OF LAND. *Vendor and vendee. Streets.* Where the owner of land sells it as building lots, bounding them on streets of a specified width as laid down on a map, although not actually opened, the purchaser acquires a legal right as against the grantor to have the streets opened to the width designated in the map. And if the land on which the streets are laid off belong to the vendor, the purchaser may, as against him and those claiming under him by the same sale, enforce the opening of the streets, or the keeping of them opened, and, if this mode of relief cannot be had, may have an abatement of the purchase price.

FROM MADISON.

Appeal from the Chancery Court at Jackson. T. C. MUSE, J.

R. J. HAYS for complainant.

R. W. HAYNES for defendant.

COOPER, J., delivered the opinion of the court.

Bill filed January 1, 1878, to enforce an express vendor's lien for unpaid purchase money of land. The defendant filed a cross-bill for a deduction from the purchase price by reason of the partial closure of a street bounding the land. The chancellor made the deduction claimed, and, upon the appeal of the original complainant, the Referees recommend a reversal of the decree. The exceptions to the report open the case.

The deed of the complainant to the defendant describes the land sold and conveyed as contiguous to

the Butler division of the city of Jackson, "in Block No. 29 and lot No. 2 as designated on plan prepared by J. B. Cook, bounded as follows, to-wit: Beginning on a stake, 12 feet south of James O'Conner's south-west corner, on the east side of Short street, runs south 48 poles to north boundary of Lake street, thence east 32⅓ poles to Mobile avenue, thence north 48 poles to a stake 12 feet south of O'Conner's south-east corner, thence west 32⅓ poles to the beginning." The sale and conveyance were made December 31, 1867, with the privilege of extending the payment of the purchase money for not exceeding ten years by paying the interest every six months. The defendant made payments both of principal and interest of the purchase money until shortly before the filing of the bill, when he found that Short street—one of the streets called for by his deed and bounding his land on the west—was being narrowed by the owner of the land on the opposite side of the street. Since the commencement of the suit, the defendant has paid into court the residue of the purchase money upon a written agreement between the parties, without prejudice to his rights in the litigation.

The deed itself, as we have seen, shows that the land sold and bought was a lot in a specified plan of lots laid off adjacent to the city of Jackson. It calls for streets on three sides of the land, the street on the west being designated as Short street. The averment of the cross-bill is that the plan was graduated to the scale, and that short Street was marked thereon as of the width of 50 feet, and that the sale

and purchase were made on the faith of the plan. The answer to the cross-bill does not deny that the sale was by a plan in which the streets called for were laid out. It merely denies that there were any other or different representations as to metes and bounds, streets and alleys than those set out in the deed. It says: "That the streets and alleys of the Butler division of the city of Jackson are none other than those which were then and are now in and around the property sold to the defendant, and that the said sub-division and survey of Cook, by maps or otherwise, did not then nor since lay down, or intend any street or alley, on either side of said property to be 50 feet wide, and any and all such streets of that width are and were, then and now, imaginary so far as Donovan is concerned, and respondents require strict proof in that regard." The answer is put in by the complainant, and her agent, W. E. Butler, by whom the trade was made. It concedes, what the deed itself states, that the sale was by a plan, and only puts in issue the width of the street.

The plan of the land was in the possession of the agent in his office, and hung up publicly for inspection. The defendant and his brother prove that the sale was by this plan, and that Short street was marked by the agent himself as of the width of 50 feet, the figures 50 being written on the space for the street in the plan. The defendant's brother deposes that he is himself a draftsman, and could see from the eye that the plan was graduated, and that Short street showed a greater width than the other streets. The

complainant has not introduced the plan, shown when last seen to have been in the possession of her agent, nor has she introduced any testimony on the point in issue. The proof is that the land on the south-western corner of the land bought was, at the time, owned by one Kelly, extending northwardly on Short street about half the length of defendant's lot, and that the complainant owned the residue of the land in front of defendant on Short street, and sold it to Kelly after the sale to defendant. Kelly has run a fence the whole length of Short street in front of defendant's land, so as to reduce the width of the street to 30 feet. The witnesses all agree that the reduction in the width of the street has diminished the value of the defendant's land. The lands were entirely open when the sale and purchase were made.

The authorities are uniform, it is believed, that when the owner of land sells it as building lots, bounding them on streets of a specified width as laid down on a map, but not actually opened, the purchasers acquire a legal right as against the grantor to have the streets opened to the width designated on the map: 3 Wash. Real Prop., 417. The law has been so recognized by this court: *Leake* v. *Cannon*, 2 Hum., 169; *Scott* v. *Cheatham*, 12 Heis., 713; *Hardy* v. *Memphis*, 10 Heisk., 127. If the land on which the streets are laid belong at the time to the vendor, the purchaser may as against the vendor and those claiming under him by the same sale enforce the opening of the streets, or the keeping of them open, as was held in the first of the cases cited. If for any reason, this

mode of relief cannot be afforded, the purchaser is entitled to an abatement of the purchase money to the extent of the loss or injury sustained: *Moses* v. *Wallace*, 7 Lea, 413. The fact that Kelly owns a part of the land along the street, and has acquired the residue by an independent sale which does not recognize the plan under which the defendant purchased, prevents a specific performance, and the only remedy of the defendant is to have an abatement of the purchase money. To that extent the defendant's right to relief is clear.

No exception was taken to the report of the clerk in the court below upon the amount of damage sustained by the defendant by narrowing the street. Nor was any exception made by the complainant to the report of the Referees, nor any question made in the argument submitted in her behalf on this point. The report of the Referees will therefore be set aside, and the decree of the chancellor affirmed with costs.

SAMUEL ROTHSCHILD *v.* THE STATE.

CRIMINAL LAW. *Indictment. Obtaining goods by false pretense.* An indictment for obtaining goods by false pretenses, under the Code, section 4701, is good which charges the defendant, a merchant, with obtaining goods of another, by false representation, made with intent to defraud that other, of existing facts bearing upon his ability to pay for the goods.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. J. M. GREER, J.

LEHMAN and GANTT for Rothschild.

WRIGHT, HEISKELL and ATTORNEY-GENERAL LEA for the State.

COOPER, J., delivered the opinion of the court.

The prisoner has appealed in error from a judgment of conviction for the crime of obtaining goods under false pretenses. The indictment charges the prisoner with feloniously obtaining, with intent to defraud the owners, certain specified articles of jewelry, the property of a firm named, of the aggregate value of $1,178, by false pretenses made to the agent of the firm, which pretenses were: "That he had in his store, where he and the agent then were, pledges and pawns upon which he had loaned the sum of $5,000, then and there pointing out to said agent what appeared to

be a large quantity of goods which he represented to be said pledges; that he, the said Samuel Rothschild, was in good and solvent condition; that he had had trouble formerly but was all right now; that he was then doing a good, large and prosperous business, and that his business was increasing, then and there pointing out to said agent a large display of what he claimed to be solid gold goods in his show case; that he had a lease upon the whole store-room in which he did business, and rented part of what had been partitioned off for a cigar store, and that his condition was such that he would soon enlarge his business by occupying the entire store; that he could buy on credit all the goods he wanted; whereas in truth and in fact he well knew at the time that said pretenses and representations were false," the indictment then negativing each of the representations.

Motions were made in the court below to quash the indictment, and in arrest of judgment, and it is now insisted that these motions should have been sustained. The argument is that all of the alleged fraudulent pretenses are matters of opinion except those relating to the pawns and pledges and the solid gold goods, and that these latter, as well as the others, are confined to the subject of the ability of the defendant to pay for his purchases, and amount only to falsehoods on that subject, and are not sufficient under the statute.

The statute is: "Every person, who, by any false pretense, or by any false token, or counterfeit letter, with intent to defraud another, obtains from any person any personal property, * * shall on conviction be

imprisoned in the penitentiary not less than three nor more than ten years": Code, sec. 4701. The statute is borrowed from the original English statute, and is the same as is found on the statute books of several of the States. The generality of the language is such as to make it almost impossible to define the offense so as to cover all cases, and this court, in common with other courts, has said that each particular case must be determined on its own facts.

The statute was not intended to apply to every case of falsehood or dishonesty by which one party gets an advantage over another, for such a construction would be entirely too sweeping, and include many cases clearly not within the evil intended to be provided against. It was accordingly held, in one of the earliest cases in our books, after a conviction, that the obtaining of a quart of whisky by falsely pretending to be sent for it by another would not be sufficient if there was the least doubt whether the prosecutor was deceived by the pretense: *Chapman* v. *The State*, 2 Head, 36. But, in the very next case, it was held to be within the statute to obtain goods upon the pretense of a verbal order from another, with intent to defraud, and under such circumstances as to impose upon a man of ordinary prudence and caution: *McCorkle* v. *The State*, 1 Cold., 333. And it was afterwards held not to be proper prudence and caution to accept, without resorting to other sources of information, the representation of the defendant, upon which he obtained the goods, that he had received by express a package of goods of a named value, somewhat less than the

value of the goods obtained, which, with much other property of his, was at defendant's office, subject to be applied to the payment of the price of the goods obtained, consisting of a suit of clothes: *State* v. *De Hart*, 6 Baxt., 222. In *Delaney* v. *The State*, 7 Baxt., 28, money was obtained from a bank upon a pretended order in writing of a New York firm for which the defendant represented himself to be the agent. "It cannot be held," said Judge Deaderick in delivering the opinion of the court in this case, "that the 'common prudence and caution' held necessary to be exercised shall be such suspicion and distrust as to impose upon the person, who is the subject of the imposition, such inquiry and investigation into the facts pretended as to secure him against the possibility of imposition, or that such precaution against deception should be adopted as only the very cautious resort to; but that there should be something in the nature of the transaction itself to show that a person of common prudence and caution could not have been imposed upon thereby." And in *Bowen* v. *The State*, 9 Baxt., 45, where the indictment averred that the defendant had obtained money from the prosecutor by representing himself as a physician, claiming to have restored sight to a blind man, and stating that the prosecutor, his residence and his grand-daughter were poisoned, and that he would remove the poison, the indictment was sustained although the judgment was reversed for error in the admission of testimony. The prosecutor was an old and ignorant negro, and the court said: "If ordinary caution is to have its influence in the

application of the law, it must be such ordinary caution as we may naturally and reasonably expect to exist under the circumstances and condition in life of the person practiced upon." And this is in accord with the current of authority: 2 Bish. Crim. Law, sec. 464.

In *Moulden* v. *The State*, 5 Lea, 577, it was held that the obtaining of goods by giving an order on his employer for wages afterward to become due to the defendant, and subsequently collecting the wages himself, concealing the fact that he had given the order, would not constitute the offense of obtaining goods under false pretenses. And in *Canter* v. *The State*, 7 Lea, 349, a judgment of conviction under the statute was arrested, because the indictment did not show that the title of the goods was parted with, and because the pretense alleged for obtaining possession of the goods consisting of a suit of clothes, namely that he could not try them on at the prosecutor's store, was one not likely to deceive any person, the merchant being as well qualified to judge of this as the defendant. The indictment contained a further charge that the defendant represented that a third person named owed the defendant and would get the goods, when they were returned by the defendant, and pay for them. The court said that the pretense must consist in the statement of some existing fact, and not be a mere promise of something to be done in the future. The representation, it was added, that the person named owed the defendant money was a representation of an existing fact, but which, taken alone, related only to the

defendant's ability to pay. The other representations were as to what the defendant promised to do in the future, or what the third person was to do for him, and were not sufficient to sustain the indictment.

From this review of our decisions, it will be seen that they bear mainly on the question of the prudence and caution to be exercised by the person from whom the goods were obtained, and that they seem to settle that the representation relied upon as a false pretense, must be as to an existing fact, and not amount only to a promise of something to be done in the future either by the defendant or some third person. There is a suggestion in *Canter's* case that if the representation of an existing fact relate only to the defendant's ability to pay, it would be insufficient. But this suggestion must be taken in connection with the facts of the particular case, that the representation consisted in the statement that a third person named owed defendant a small sum of money, and would pay for the goods, and that it was not so much a false pretense as a false affirmation. An indebtedness, moreover, from a person of unknown means is not such a fact as, if it were true, would induce any person of ordinary prudence to part with his money: *State* v. *Magee*, 11 Ind., 154.

The false pretense, the authorities agree, must be of some existing or past fact, in distinction alike from a mere promise and a mere opinion, and this fact must be such in its nature as is known to the person employing the pretense: 2 Bish. Crim. Law, secs. 429, 415. If there is a sufficient false pretense of an ex-

isting or false fact, blended nevertheless with a promise for the future, the pretense is sufficient: *Id.*, secs. 415, 427. And there need be only one false pretense, and therefore, though several pretenses are set out in the indictment, yet if any one of them is proved, the indictment will be sustained: *Id.*, sec. 418. A common instance of a false pretense, says Mr. Bishop, is where one represents himself or his firm to be in a sound pecuniary condition, or to owe only so much, or to be worth so much money, knowing the facts to be otherwise; or falsely pretends to have a particular fund in his own hands or another's, whereby he gains a credit: *Id.*, sec. 437.

Tested by these rules, the averment in the indictment that the defendant could buy on credit all the goods he wanted, and that his business was prosperous and increasing, would be the mere expression of an opinion. The averment that the defendant would soon enlarge his business would amount only to a promise of future action. Other averments, such as "that he had trouble formerly but was all right now," and "that he had a lease upon the whole store room," and rented part of it, taken by themselves would amount to nothing. But the indictment may be divided into two averments, each of which may be considered as embodying a false pretense, viz:

First. That he, defendant, had in his store room, where he and the prosecutor then were, pledges and pawns upon which he had loaned $5,000, then and there pointing out to said agent what appeared to be a large quantity of goods which he represented to be said pledges.

Second. That said Samuel Rothschild was in good and solvent condition; that he had had trouble formerly but was all right now; that he was then doing a good, large and prosperous business, and his business was increasing, then and there pointing out to said agent a large display of what he claimed to be solid gold goods in his show case; and that he had a lease on the whole store room in which he did business.

The first of these alleged false pretenses is undoubtedly the statement of an existing fact. The second is a statement of the defendant's pecuniary condition at the time, sustained by the representation of certain existing facts bearing on that condition. When the representation is in words, and there are conversations at different times, they may be connected to show a false pretense, though what was said on any one occasion would not be alone sufficient. And the question is for the jury whether the different conversations can be so connected as to constitute one transaction: 2 Bish. Crim. L., sec. 431. *A fortiori*, where the conversations are all at one time, or the various statements parts of the same conversation. All of these statements relate, it is true, to the ability of the defendant to pay for the goods obtained. And if that fact renders them insufficient to constitute a false pretense within the statute, then the indictment is bad. But in that view there never can be a statement of facts touching the pecuniary condition of a person upon the faith of which goods are parted with, which could

fall within the statute. And the statute would merit the reproach that it caught little rogues, but allowed the big ones to escape. The weight of reason and authority is otherwise. "In England and New York," says Judge Wright, and it may now be added in other States, "under the same statute, it has been held to be within the statute where a party has obtained goods by falsely representing himself to be in a situation he was not, or by falsely representing any occurrence that had not happened, to which persons of ordinary caution might give credit. The ingredients of the offense are obtaining goods by false pretenses, and with an intent to defraud": *McCorkle* v. *State*, 1 Cold., 333. The intent to defraud makes the felony, and its absence is a protection against danger from mere expressions of sanguine hopefulness or mistaken belief. "There is always a point," says Mr. Bishop, "at which opinion ends and fact begins. The test must be the common sense of judge and jury applied to the special facts of the case": 2 Crim. Law, sec. 429. The indictment before us is sufficient.

There being no error in the proceedings, the judgment must be affirmed.

S. Robbins *v.* Taxing District.

Constitutional Law. *Privilege Tax. Drummers.* The act of 1881, chapter 96, section 16, amending the Taxing District law, which provides that drummers, and all persons not having a regular licensed house of business in the Taxing District, offering for sale, or selling goods, wares and merchandise therein by sample, shall be required to pay a specified privilege tax, is constitutional and valid.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. Pierce, J.

F. T. Edmonson and Luke E. Wright for Robbins.

S. P. Walker for Taxing District.

Cooper, J., delivered the opinion of the court.

The plaintiff in error, a citizen of Cincinnati, Ohio, is a drummer for the firm of Ross, Robbins & Co., of the same place, the firm being engaged in selling paper, writing materials, and such articles as are used in the book stores of the Taxing District of Shelby county, a municipal corporation commonly known as the city of Memphis. He has appealed from a judgment against him for plying his vocation by selling by sample within the Taxing District, without taking out a license for the purpose, goods to be furnished by his employers. It is insisted on his behalf that the act of the Leg-

islature imposing the privilege tax claimed is unconstitutional.

Selling by sample was first made a privilege in this State by the revenue act of 1871, chapter 51, section 6, and the provision was repeated in the act of 1873, chapter 118, section 46. The power of the Legislature to create a privilege for purposes of taxation, and to authorize its taxation by municipal corporations is not denied: *French* v. *Baker*, 4 Sneed, 193; *Mayor, etc.*, v. *Guest*, 3 Head, 413. To enable any person to exercise the privilege thus created he must, of course, comply with the requirements of the law or ordinance, whether he be a resident or non-resident of the State: *Howe Sewing Machine Company* v. *Cage*, 9 Baxt., 518; *Robertson* v. *Heneger*, 5 Sneed, 257; *Lightburne* v. *Taxing District*, 4 Lea, 219; *Singleton* v. *Fritsch*, 4 Lea, 93. The Legislature may classify merchants or other dealers for purposes of taxation: *Voss* v. *Memphis*, 9 Lea, 294; *Eastman* v. *Jackson*, 10 Lea, 162. It may classify for like purposes the same vocation: *State* v. *Schleier*, 3 Heis., 281; *Fulgum* v. *Mayor, etc.*, 8 Lea, 635. And may impose a privilege tax in addition to a regular occupation tax, and make it different for different classes of the same occupation: *Kelly* v. *Dwyer*, 7 Lea, 180; *Jenkins* v. *Ewin*, 8 Heis., 456.

The act of 1879, chapter 84, which created the Taxing District of Shelby county, provided by section 57, sub-section 50: "All persons, not having a regular licensed house of business in the Taxing District, and selling goods, wares and merchandise therein by sample, shall be required to pay" a specified privilege tax.

The statute in substance made it a privilege for persons not having a regular house of business in the district, whether a resident or non-resident of the State, to sell by sample within the district, or corporate limits of the municipality. The Legislature having the power to classify merchants, as we have seen, and to add on to any class of merchants a privilege tax, the validity of the legislation would seem to follow of course. Resident merchants shall pay a regular occupation tax, but traveling salesmen of other merchants, who otherwise pay no tax, shall pay a privilege tax.

The act of 1881, chapter 96, section 16, is: "That sub-section 50 (of 1879, ch. 84, sec. 57), be amended to read as follows: "All drummers, and all persons not having a regular licensed house of business in the Taxing District, offering for sale, or selling goods, wares or merchandise therein by sample, shall be required to pay" a specified tax. The change is in words not substance. The business of a drummer, if the latter be correctly defined as an agent who sells by sample, was embraced in the original provision. "The term drummer," this court has said, "has acquired a common acceptation, and is applied to commercial agents who are traveling for wholesale merchants and supplying the retail trade with goods, or rather taking orders for goods to be shipped to the retail merchant": *Singleton* v. *Fritsch*, 4 Lea, 96. More accurately, perhaps, a drummer is a traveling agent who sells, or offers to sell by sample, by representation of his employer's goods, or by soliciting orders. He would in any event be a person selling

by sample. The meaning of the statute is that any person not having a regular licensed house of business in the district must pay a privilege tax for selling or offering to sell by sample in the district. The statute merely creates a new privilege by designating a separate and distinct class of traders who shall be required to take out a license in order to ply their business. It makes no discrimination between persons of that class, or against non-residents of the State. It only provides that the particular class shall pay a privilege tax to the local government where they do business, which class would otherwise pay nothing.

There is nothing to impeach the validity of this legislation in the opinion of this court in the *Mayor, etc., of Nashville* v. *Althrop*, 5 Cold., 554. At the time of the passage of the municipal ordinance in controversy in that case, the Legislature of the State had not made selling by sample a taxable privilege, nor authorized the corporation of Nashville to tax merchants or other traders except generally as one class. The city of Nashville undertook by ordinance, in advance of State legislation, to make the business of selling goods by sample in the city a separate avocation and taxable as such; and, by another section of the ordinance, to require all merchants of other cities and their agents, and all other non-residents of the city, whether manufacturers, merchants or other dealers, who may offer goods for sale in the city, either by sample, representation or the taking of orders, to obtain a license therefor, with a proviso that the ordinance should not be so construed as to impose any

additional tax or disability upon merchants of the city. It was held, and correctly, as this court has since said in *Vosse* v. *Memphis*, 9 Lea, 297, that municipal corporations "have no power to create a privilege for the purpose of taxing it, or to discriminate between persons exercising the same privilege, by imposing a tax on one class at a higher rate, or in a different mode, or upon other principles than are applicable to the exercise of the same privilege by others," that is, adds the judge in the subsequent case of *Vosse* v. *Memphis*, "of the same class," citing, in support of the qualification, the *State* v. *Schleier*, 8 Heis., 455, and his own opinion in *Fulgum* v. *Mayor, etc.*, 8 Lea, 635. These cases settle that the Legislature may divide merchants, or other dealers into classes for the purpose of separate taxation, and may authorize municipal corporations to make the same division. The Legislature, by the statute under consideration, has now done what the municipality could not itself previously do, and created a privilege of a specified part of a general business, which might otherwise have been carried on under the usual occupation license, for purposes of taxation. This was, as we have repeatedly held, within the competency of the Legislature.

It was said in *Althrop's* case that the second section of the ordinance in controversy was open to the further objection that it discriminated between merchants, manufacturers and other dealers residing without the limits of Nashville, and members of the same class residing in the city. "This," it was added, "cannot be done, and would be equally beyond the

authority of either the State or the municipal Legislature." The reason is, as stated by Judge Cooley in the paragraph cited from his work on Constitutional Limitations, that a statute would not be constitutional which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt. But this statute makes no discrimination among or between the individuals of the class covered by it, the class being not merchants generally, but traveling agents of non-resident houses doing business within the city. And under our decisions it is sufficient if all persons in the same class must pay the same tax for the privilege: *Fulgum* v. *Mayor, etc.*, 8 Lea, 640.

It is said, however, that persons having a regular licensed business house in the district may sell by sample within the district without taking out the license under the statute, and therefore there is a discrimination in their favor. The record does not show that any persons having a licensed house of business in the district ever sell by sample therein, and it is not easy to see how such a mode of selling could exist where the goods themselves were on hand in the district. And if a resident merchant undertook to sell goods to be ordered from a distance, we have expressly held in the case of a merchant tailor, that he would be liable for the regular occupation tax: *Singleton* v. *Fritsch*, 4 Lea, 93.

But if the fact be conceded that resident merchants do sell their own goods by sample within the district,

the fact that they are exempted from the special privilege tax would not make the latter a partial law. The Legislature, we have also expressly held, may make exemptions of individuals of a class from a special tax without affecting the validity of the tax law: *Fulgum* v. *Mayor*, 8 Lea, 840.

In that case a license tax was imposed by ordinance upon the privilege of keeping a hotel proportioned to the rental value, hotels having less than ten rooms being exempted. In the case of the *Pullman Sleeping Car Company* v. *Gaines*, 3 Tenn. Ch. 587, the act of 1877, chapter 16, section 6, was considered, which provided: "That the running and using of sleeping cars on railroads in Tennessee, not owned by the railroads upon which they are run and used, is declared to be a privilege," and taxed. The statute clearly exempts the owners of the railroads from the tax, and the question was presented, which is now made in this case, whether the exemption did not make the act amenable to the constitutional objection that it was a partial law. It was held, however, that the Legislature merely intended, by the language used, to exclude the idea of interfering with the franchises of the railroads granted by their charters, the law presuming that the company has paid, in taxation or otherwise, for the franchises thus conceded. So here, if in fact, selling by sample within the municipality is a part of the business of the resident merchant, his regular occupation license would cover it. The person not having such a licensed place of business must pay the privilege tax; and, as we have

seen, a privilege tax may be added to an occupation tax of a class of merchants or traders: *Kelley* v. *Dwyer*, 7 Lea, 180; *Jenkins* v. *Ewin*, 8 Heis., 456; *Vosse* v. *Memphis*, 9 Lea, 294.

There is nothing in the suggestion that the act under consideration is unconstitutional because it makes the selling by sample a privilege in the Taxing Districts alone, and not in other parts of the State. The Legislature has the power to create municipal corporations by general law, and clothe them with authority to levy local taxes, and we have held the Taxing District act to be a general law.

That such a tax is not a regulation of commerce between the States is well settled: *Osborne* v. *Mobile*, 16 Wall., 479; *Speer* v. *Commonwealth*, 23 Grattan, 935; *Ex parte Robinson*, 5 Rep., 181; *Lightburne* v. *Taxing District*, 4 Lea, 219; *Pullman Car Company* v. *Gaines*, 3 Tenn. Ch. 587.

Judgment affirmed.

G. N. TRUSS *v.* THE STATE.

CONSTITUTIONAL LAW. *Sale of cotton.* The act of the Legislature Acts of 1879, ch. 106, entitled "An act to prevent the sale of cotton between sunset and sunrise" is constitutional and valid.

2. CRIMINAL LAW. *Accomplice. Misdemeanors.* There are no accomplices in misdemeanors, and therefore the rule that a conviction cannot be had upon the uncorroborated testimony of an accomplice does not apply to misdemeanors.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby county. J. M. GREER, J.

S. P. WALKER, W. H. CARROLL and GEORGE GANTT for Truss.

J. W. CLAPP and ATTORNEY-GENERAL LEA for the State.

TURNEY, J., delivered the opinion of the court.

Plaintiff in error was indicted and convicted in the criminal court of Memphis of a violation of chapter 166 of the acts of 1879, entitled "An act to prevent the sale of cotton between sunset and sunrise," and providing:

"Sec. 1. Be it enacted by the General Assembly of the State of Tennessee, That hereafter it shall not be lawful in this State to buy or sell, barter or exchange, or receive on deposit, any cotton in the seed or ginned, but not baled, between the hours of sunset of any one day and sunrise of another.

Sec. 2. * * * That any merchant or other person violating the first section of this act shall be guilty of a misdemeanor," etc.

It is argued for the accused that the act is violative of so much of section 17 of Article 2 of the Constitution as is contained in the words: "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title."

The question is made upon the use of the words "receive on deposit" in the body of the act, but which are omitted from the title.

We must construe the act by arriving, if we can, at the intention of the framers of the Constitution. We think it clear that the purpose was to put legislators upon notice of what they were called upon to vote for or against, and to avoid and break down what was known before the Constitution of 1870 as omnibus legislation, which consisted in amending bills by matter wholly foreign to the intention of the author of the original, and having no resemblance to the caption or body of his proposed act, thus misleading Assemblymen into the support of something they knew not of, and of which they derived no information from the caption or preamble to the act. Whatever is of sufficient import to direct the mind to the subject of proposed legislation meets the object of the Constitution: *Cannon* v. *Mathes*, 8 Heis., 519; *State* v. *Lassater*, 9 Baxt., 584; *Gowan* v. *State*, MS.

The use in the caption to "prevent sales of cotton" necessarily calls the attention to sales of every character and the steps ordinarily taken to effect them.

The term "receive on deposit" is used in the act in connection with sale, barter and exchange, and as a step to their accomplishment. The Legislature must be understood to have meant "to receive on deposit" with a view to sell, and as a step taken to put the article on the market. In short, the term "sale" must be construed to include every thing necessary to its consummation, the offer to sell being the initial move, a deposit for sale is an offer to sell.

The usual definitions of a deposit cannot control in this case. Now we must define the word by its surroundings, and give to it that sense plainly intended to be gathered from the entire context of the act. We think the act does not violate the Constitution—that the act embraces but one subject in the title.

It is next objected that the conviction was upon the uncorroborated testimony of an accomplice. The objection, in my opinion, is well taken. In the case of Graves & Poston against the State, MS. opinion, July, 1871, Judge Nelson, after an elaborate and very able and exhaustive review of the English and American authorities on both sides of the question, says: "On the whole, we declare the rule of law, and not merely of practice in this State to be as stated by Mr. Joy, that the confirmation ought to be in such and so many parts of the accomplice's narrative as may reasonably satisfy the jury that he is telling the truth, without restricting the confirmation to any particular points, and leaving the effect of such confirmation to the consideration of the jury." He proceeds:

"The charge of the circuit judge is not in accordance with this rule; while he laid down the broad rule, without any qualification, that the jury may be warranted in convicting on the uncorroborated evidence of an accomplice, his advice was that it should be in some measure confirmed by other satisfactory evidence. This is not a sufficient warning to the jury. "In some measure confirmed," furnishes no rule for the government of the jury," etc.

This ruling has been followed in several instances, and is, as I think, the settled one in Tennessee. For some reason the opinion has not been reported.

The majority, however, is of opinion that the rule does obtain in misdemeanors. I am unable to take the distinction, we constantly hold, and have so written, that the doctrine of reasonable doubt applies in misdemeanors. It seems to me the principle is the same in both cases.

Affirmed.

MACK STADLER & CO. *v.* MORRIS HERTZ & CO. *et al.*

1. CHANCERY PRACTICE. *Signature to answer.* Where oath to answer is waived and the answer is signed by solicitor and not by defendant, it is at most but an irregularity, to be taken advantage of within twenty days after the answer is filed, which may be cured by leave of the court. But the practice in our courts long has been to treat the signing by responsible solicitors sufficient in pleading to which no oath is required.

2. CHANCERY PRACTICE. Exceptions to depositions because taken during trial term of the court are good.

3. SAME. A note which was evidence of the debt claimed in the bill, and which the bill stated would be filed before the hearing, was filed by complainants as evidence and so marked by the clerk, became a part of the record without bill of exceptions.

4. SAME. *Jury in chancery.* Where a rule of the court was published and entered on the minutes, declaring that no jury would be allowed unless demanded on or before the second day of the term, and motion for a jury was made more than a week after beginning of the term. *Held*, not error for the chancellor to refuse to order a jury.

5. SAME. *Same.* Where in the decree refusing to order a jury, the court recites that it is refused because not applied for within the time required by a general rule of the court, "which rule of the court is hereby made a part of this record and will be certified in case of appeal, with the transcript." *Held*, that this order made the rule of the court a part of the record.

FROM MADISON.

Appeal from the Chancery Court at Jackson. H. W. MCCORRY, Ch.

JNO. L. H. TOMLIN for complainants.

CARUTHERS & MALLORY for defendants.

DEADERICK, C. J., delivered the opinion of the court.

The bill is filed attacking a deed of trust, to secure creditors as fraudulent. The deed is made by defendants, Morris Hertz & Co., and secures debts due to their co-defendants, most of which are impeached as fictitious. This is denied by the creditors and trustee, and there is no evidence to sustain the allegation. The oath to the answers of defendants was waived, and they were signed by their solicitors only. A motion was made to take the answers from the file because not signed by defendants. This motion was overruled by the chancellor.

During the term at which the cause was tried, the complainants, on notice to defendant's solictors, took the depositions of T. C. Muse and J. H. L. Tomlin. Exceptions to said depositions were filed by defendants, on the ground of their having been taken in term time, and sustained by the chancellor. Complainants then demanded a jury to try issues to be made up, which demand was refused. A continuance of the cause was refused upon affidavit filed by complainants. The chancellor, upon the hearing, dismissed the bill, and complainants have appealed.

The Referees have reported recommending a reversal of the decree, and the remanding of the cause for the purpose of having the issues tried by a jury, they being of opinion that the refusal of a jury trial was error. And it is upon this supposed error that the Referees mainly predicate their recommendation of a reversal, although there are other proceedings which they regarded as irregular if not erroneous.

The defendants have excepted to the report, as heve the complainants, also to so much of it as holds their affidavit for a continuance properly overruled.

The motion to take the answers filed from the files, was made upon the ground that said answers were not signed by respondents. They were signed by their solicitors, as such, and the respondents were excused by complainants from answering under oath. The objection is technical, and although there is authority to support the proposition that the answer should be signed by the respondents, notwithstanding the oath is waived: Sto. Eq. Pl., sec. 875, yet if the omission were material where it is signed by solicitors, it would be under our statute, but an irregularity to be taken advantage of within twenty days after answer filed, which might be easily cured by leave of the court: 2 Tenn. Ch. R., 627.

In this case the motion was not made until at the hearing, long after the filing of the answers. Besides, we think the practice in our courts long has been to treat the signing by responsible solicitors, as sufficient, in pleadings to which no oath is required.

We think the report of the Referees was correct in respect to the insufficiency of complainants' affidavit for a continuance. It does not state that the evidence desired was material. It stated a wish to retake the depositions of Tomlin and Muse, whose depositions had been taken during that term of the court, and rejected on exceptions taken by defendants. These depositions were incorporated in the bill of exceptions, and if they could be looked to, would not sustain complainants' bill.

We think the exceptions to the depositions were well taken, so far as respects their admissibility at that term of the court, during which the notice to take them was given, and during which they were in fact taken, without any order of court or agreement of parties. The cause had been at issue about a year, and no steps were taken by complainants to produce evidence until during the term at which the cause was heard and determined.

At this term, the note which is the evidence of debt claimed in the bill, and which the bill states would be filed before the hearing, was filed by complainants as evidence in the cause, a few days before the cause was heard. It was marked "filed as evidence by complainants," etc., by the clerk, and no exceptions were taken to its not having been filed at an earlier date by defendants. It was legitimately in evidence under 1 Rule in chancery, and according to the practice of the chancery court, and no bill of exceptions was necessary in a chancery case, to make it part of the record. Nor do we think that the court below was in error in refusing a jury to complainants. For the purpose of saving costs and time, and to have all jury cases tried about the same time and for the convenience of the court as recited therein, a rule of court was published and entered upon the minutes of the court, declaring that no jury will hereafter be allowed in this court, unless the demand therefor be made on or before the second day of the term, by motion on the motion docket, or at the bar of the court.

This we think a reasonable regulation, preventing surprise to the adverse party and affording opportunity to obtain a jury. The motion in this case was made more than a week after the beginning of the term, and on the same day on which the cause was heard and the decree entered.

We think the Referees were in error in holding that said rule is not properly a part of the record. In the decree of the court refusing a jury, the court recites that it is refused because not applied for within the time required by a general rule of the court, which rule of the court is hereby made a part of this record, and will be certified in case of appeal, with the transcript.

This order, we think, makes the rule of the court part of the record, and it has been certified by the clerk as ordered by the court. It might be added that the note sued on in this case, and filed by complainants as evidence, upon its face shows that it bears ten per cent interest, which rate of interest was illegal at the time it was made and fell due.

The illegality of the contract being apparent upon its face, a party seeking to enforce it must be repelled, so that we are of opinion that the report of the Referees is erroneous, and must be set aside, and the chancellor's decree affirmed with costs, and the cause will be remanded for the execution of said decree.

GROMMES & UHLRICK *v.* THEIME *et al.*

RES ADJUDICATA. *Practice.* Where a demurrer to a bill was sustained by the chancellor and an appeal was taken to the Supreme Court, where, by consent, the cause was referred to the court of arbitration (then in existence), and they awarded and found that the decree of the chancellor was erroneous and should be reversed, and the cause remanded to the chancery court, etc., and the award was approved by the Supreme Court and made the decree of same. *Held*, the award, to all intents and purposes, became the judgment of the Supreme Court, and that although the Supreme Court may review and reverse its own rulings in subsequent cases, yet the decrees once rendered are final and conclusive in the particular cases in which they are made, as to the matters adjudged.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W. W. McDOWELL, Ch.

—— METCALF for complainants.

—— RANDOLPH for defendants.

COOKE, Sp. J., delivered the opinion of the court.

In 1867 respondent Theime executed certain fraudulent conveyances of his property and effects for the purpose of hindering and delaying his creditors. Thereupon Beherends, to whom he was indebted, filed a bill attacking said conveyances, and attached a considerable portion of the property conveyed. Among the property thus attached, as was then supposed, was 44½ gallons of Irish whisky and 25,900 cigars, which was claimed by Grommes & Uhlrick and they brought

an action of replevin for the same in the circuit Court against Theime, to whom they claimed to have consigned said goods to be sold on commission, and Sangster, the officer who levied the attachment, and under which the cigars and whisky were replevied and delivered to them. They failed to prosecute their action of replevin and judgment by default was entered against them, and a writ of inquiry awarded to ascertain the value of the goods so replevied which executed, judgment was rendered in favor of Theime and Sangster.

This was in December, 1873, and in January, 1874, and in less than one year they filed against them for $943 this bill, to enjoin the collection of said judgment, upon the alleged grounds that said goods, in fact, belonged to them and not to Theime; that Theime had no right in the same, except the mere right to the possession as custodian for complainants, and that although Sangster was sued along with Theime in said action, he was made a defendant, for the reason that he was supposed to be jointly in possession of said goods with Theime by virtue of said attachment, but which is alleged to have been a mistake, and that the attachment had not been levied upon said goods, and if Sangster had any possession of them, it was merely as agent for Theime or as a naked trespasser, and that Sangster did not pretend to claim any interest whatever in the same or in said judgment; that the attachment suit of Beherends against Theime was ended and no decree made upon said levy or order of sale of said goods, and hence it was abandoned. They

allege as an excuse for permitting said judgment by default to be taken against them in said action of replevin, that before the return term said Theime had filed his petition in bankruptcy and which their counsel understood to operate as an injunction upon any further proceedings in said cause, and for that reason failed to file a declaration and prosecute said suit; that said judgment was not rendered upon the merits, and that as they were the owners of the goods and no other person had acquired any right to them, said Theime and Sangster could only hold said judgment in trust for them. They further allege that Theime is justly indebted to them in a larger amount than his interest, if any he has in said judgment, and seek in the alternative to set off the same, and that both Sangster and Theime are insolvent, etc.

Sangster disclaimed any interest in the goods that were replevied by complainants, or the judgment, or that he had levied upon the said goods, according to the best of his knowledge, information and belief, and says if any levy was made it was anulled by the bankruptcy of Theime.

Beherends came in by petition and had himself made a party respondent in this cause, and he and Theime jointly demurred to the bill and assigned among others the following grounds of demurrer: First, That the bill fails to show that the complainants were prevented from prosecuting their said action of replevin by any fraud, accident or mistake, but shows that their failure to prosecute the same was the result of negligence on their part, and that the judgment of the

circuit court was conclusive that complanants had no right or interest in the property replevied, and that the defendants are entitled to the same. Second, That the character of the defendants' title to the property is of no concern to the plaintiffs. It is sufficient that they have no title to the same. Third, That the filing of respondent Theime's petition to become a bankrupt and the proceedings thereon afford complainants no grounds of relief, nor do they in any manner impair the validity of said judgment at law. Fourth, If otherwise, the complainants might have been entitled to relief, their bill shows that they have been guilty of laches, and for that reason will not be now relieved.

This demurrer was sustained by the chancellor and the bill dismissed, and the complainants appealed to this court. In this court the cause was, by consent, referred to the court of arbitration, then in existence, and they awarded and found that the decree of the chancellor sustaining the demurrer was erroneous, and the same was reversed and the demurrer overruled by them and the cause remanded to the chancery court for answer, etc. This award was approved and made the decree of this court, and thus to all intents and purposes became the judgment of this court, as was held at Knoxville at the last term in an unreported case, the style of which is not now remembered.

Whatever we might think of the questions raised by this demurrer were they open for investigation, that they are settled and concluded upon us in this case by the award of the arbitration and judgment of

this court upon them, is too well settled to admit of question. The decree of the Supreme Court upon appeal from the action of the court below overruling a demurrer is final and conclusive as to questions embraced in the demurrers upon the court below and upon the Supreme Court itself upon a subsequent appeal from the final decree in the same case. And although the Supreme Court may review and reverse its own rulings in subsequent cases, yet the decrees once rendered are final and conclusive in the particular case in which they are made: *Jamison* v. *McCoy*, 5 Heis., 108.

A decree sustaining or overruling a demurrer affirmed by the Supreme Court on appeal, is final as to the points adjudged in that particular case, and may be relied on as *res adjudicata: Murdock* v. *Gaskill*, 8 Baxt., 22. The decree of the Supreme Court overruling a demurrer and remanding the cause for plea or answer, is conclusive upon that court as well as the court below, in that particular case, as to matters adjudged by the decree: 2 Baxt., 257; Cooley's Const. Lim., 47.

The effect of the decision of this court upon the demurrer overruling the same, was to determine that complainants were not estopped or precluded by said judgment of the circuit court from relying upon the original equities set up and alleged by the bill. And this we think is virtually decisive of this case, and if it were not the action of replevin not having been tried upon its merits, was no bar to the action, it having been instituted within twelve months from the

date of the final judgment in that case. Sangster, by his return, undertook to set out specifically the articles of property upon which he levied said attachment, and neither the 44½ gallons of Irish whisky or the cigars are specified in said levy, and he disclaims having levied upon them, and there is no proof to show they were actually levied upon by said attachment.

The respondents, Theime and Beherends, answered the bill and denied the equities set up and alleged by it. But the weight of ~~the proof~~, ~~we~~ think, satisfactorily establishes the fact, that the property replevied did actually belong to complainants, and that it was left with the respondent, Thieme, upon consignment to be sold for complainants on commission, and if not sold to be returned to complainants, and that Theime had no beneficial interest in the same, and that complainants had the right to demand the possession of the goods at the time they were replevied. The chancellor and the Referees have both come to the same conclusion, and we think correctly. There are other questions raised by the record, which it is unnecessary to discuss, as this is decisive of the case.

The exceptions of respondents to the report of the Referees will be overruled, the report confirmed, and the chancellor's decree affirmed with costs.

The State v. L. C. Baker.

Criminal Law. *Evidence. Witness.* When the witness is within the jurisdiction of the court, but unable to be present at the trial, and there has been no failure of diligence on the part of the defendant, he cannot be compelled to take what he assumes he can prove by the witness as set out in his affidavit for a continuance, as the testimony of the witness, upon the agreement of the district attorney that the statements of the affidavit should be read as the testimony of the absent witness. Distinguished from *Petty* v. *State*, 4 Lea, 328.

FROM GIBSON.

Appeal in error from the Circuit Court at Gibson county. J. T. Carthel, J.

Cooper & Hays, M. M. Niel and Hill & Williamson for Baker.

McDermott & Tyree and Attorney-General Lea for the State.

Freeman, J., delivered the opinion of the court.

The defendant was indicted in the circuit court of Gibson county jointly with one John Powell, for an assault with intent to commit murder in the first degree, on one Mount Elam, on the first day of August, 1881, by shooting him with a shot-gun. He was convicted and sentenced to three years imprisonment in the penitentiary, from which judgment he appeals in error to this court.

The first error assigned for reversal is the refusal of the court to continue the case on the affidavit of

defendant showing the absence of two witnesses—Mrs. Griffin and Mrs. Hammond—and requiring defendant to accept the statement of the affidavit as the testimony of the witnesses. This affidavit stated that he could prove by Mrs. Griffin, that on Friday before the shooting, on Monday morning about day-light, that John Powell, who is jointly indicted with defendant, was passing along the high-way near where Elam lived, that he and his father way-laid Powell, stopped him in the road as he was riding along, assaulted Powell with clubs, knocked him off his horse and beat him severely, the said Mount Elam, who was shot, knocking Powell off his horse, and Ed. Elam a brother, and Bud Elam a cousin, being present aiding and abetting in the assault. That they had beaten Powell cruelly and unmercifully, he being alone and having no friends with him. The purpose of this testimony, as stated, was to show that Powell had a motive for shooting Mount Elam—the theory of defendant being he had none, and that Powell alone had done it. It is further stated that Mrs. Griffin is the only witness by whom these facts can be proven, as no one else saw it except Powell and the parties engaged in it. This witness had been subpœnaed and the court had given an attachment for the witnesses mentioned, but the officer returned that owing to the state of their health, they being married ladies, they could not properly be brought to the court.

The counsel for the State and district attorney stated to the court, they would admit that Mrs. Griffin and Mrs. Hammond would testify to what affiant stated

they would, and they would agree that these statements might be read as the testimony of those witnesses. The statement of Mrs. Hammond need not be given at present, except to say the facts would have been material testimony on the trial. The defendant objected to this, insisting he was entitled to have these witnesses in proper person before the jury, and refused to agree to accept the statements in lieu of their testimony.

The court ruled on this question that the defendant must go to trial without the witnesses, and accept the statements as their evidence, to which defendant excepted. The witnesses are shown to have been within the jurisdiction of the court, but unable to attend court. It is proper, too, to say, that the testimony of Mrs. Griffin is shown to have been important is this case, for the circumstances of the attack on Powell, as to the facts, are given by Mount Elam on the trial in a very much milder form than the statements in the affidavit would indicate, and in fact, as other circumstances would show the truth to have been. Besides, he swears this difficulty was several months before the shooting, and there is no direct testimony, we believe, to the contrary—no one, if any, who saw it.

This statement presents the direct question as to whether, in a case where the witness is within the jurisdiction of the court, but unable to be present at the time of trial, where there has been no failure of diligence on the part of the defendant, the defendant can be compelled to take what he assumes he can prove by the witness, as given in his affidavit as the

testimony of the witness, upon the simple agreement of the district attorney, that the statements of the affidavit should be read as the testimony of the absent witness.

In the case of *Goodman* v. *The State*, Meigs R., 195, a prosecution for lewdness, this question came before this court directly for adjudication. The defendant tendered an affidavit for a continuance, giving the names of his witnesses, and what he expected to prove by each of them; the attorney-general agreed that the affidavit might be read as evidence, and thereupon the court ordered the case to proceed. The court reversed the judgment on this ground alone, declining to consider others urged in argument.

Judge Reese, in delivering the opinion of the court said, that in the case of *Rhea* v. *The State*, 10 Yer., the court had said "the practical operation of such an agreement upon the rights and fate of the defendant must often, if not always, be perfectly illusory. We now go further than the intimation in that case, and say that when the admission of the counsel of the State is not merely that the witnesses would testify as stated, but that the facts are true as set forth in the affidavit, such admission should not preclude the defendant in a criminal case from his constitutional right of having witnesses personally present at the trial." He adds: "It were needless to urge on practical and enlightened minds the difference in point of legitimate effect, between the personal presence of candid and respectable witnesses who testify to facts in their detail, ramification and bearing, and the general admission of

these by an attorney-general, little impressing, perhaps, the minds of the jury, and constituting as to its extent and bearing, a fruitful source of difficulty and dispute."

While we think this statement perhaps goes too far, when it is assumed that the agreement to admit that the facts stated are true as set forth in the affidavit might not be sufficient, because if thus admitted they could not be disputed, and would stand as absolutely conceded for all the purposes of the case, yet we see no answer to the argument when applied to a case like the present, where the meager statement of an affidavit is merely agreed to stand as the testimony of the witnesses or what they would swear if present. In a case like the present, where the witnesses are to facts that tend to contradict and impeach the testimony of witnesses offered by the State, all must concede the special importance of having the two classes of witnesses before the jury, so that their personal bearing, their intelligence and means of knowing the facts and freedom from bias, or the opposite may be seen by that body, a defendant would be placed at a disadvantage that might be ruinous to his cause, by losing the benefit of all these elements of weight, in giving effectiveness to testimony we have stated—elements conceded by our law to be legitimate matters of consideration to be remarked on by the trial judge in giving the rules to a jury, by which to test the value of the testimony of witnesses deposing before them. A mere written statement of what witnesses are expected to swear, as contained in an affidavit has

no one of these elements in it, and thus the defendant is deprived entirely of them by such practice. While the constitutional provision that the defendant "is to have compulsory process for obtaining witnesses in his favor," may not imperatively demand their presence in any case, yet the view of Judge Reese is certainly more in accord with the fair implications of that provision than the opposite view. It would ill accord with the spirit of that right, where the witnesses are in the reach of the process of the court, if the defendant is compelled to take a mere written statement as the equivalent of the personal presence contemplated by the use of the process guaranteed to him by the Constitution.

The learned circuit judge, no doubt, deemed his course sustained by the case of *Petty* v. *The State*, 4 Lea, 328. That case was correctly decided—the witness being a non-resident of the State and the only benefit defendant could reasonably expect from his testimony, was his deposition; at any rate, he was beyond the compulsory process of the court, and therefore not within the reasoning of Judge Reese in the case cited. Confine the opinion as it should be on well settled principles to its facts, and it makes a proper exception to a general rule, but ought not, as it was not intended to do, to be held as overruling the case from Meigs' Reports.

As the case must go back for another trial, it is proper to say that his Honor, the circuit judge, should have been more explicit in his statement of the rules that should govern the jury in giving credence to wit-

nesses sought to be impeached, and in this case rigorously attacked on their general character. They were attacked on part of defense by six witnesses, they were sought to be sustained by eight witnesses. As to this point, he simply stated in substance to the jury, that a witness might be impeached by proving that he or she was of bad character, and be sustained by proof of good character. He then told them that what credit a witness thus attacked is entitled to is for a jury to decide from all the testimony—as he puts it, "from all the evidence, do you believe the witness?"

The rule is properly given in *Kinchelo* v. *The State*, 5 Hum., 12, where the point was whether the number of witnesses attacking and sustaining were equal. The court say: "The fact that a witness is assailed by a single witness casts a reproach upon it, and it then becomes a question to be decided upon by the jury like other questions of fact, and is to be judged of, not by number of witnesses but by their respectability and intelligence, consistency and means of information."

It was the more important to give the qualification indicated in this case, where the attack was not by a single witness, but by a half dozen, and his Honor should have told the jury that where the character of the witness was thus impeached, if the attacking witnesses were respectable, intelligent, consistent and had means of information as to the question, then such an attack cast a reproach on the witness so attacked, and they should weigh their testimony in connection with all the testimony sustaining what they had said, in view of this fact. We do not say this would, in

all cases, be reversible error, but in the case before us such instruction was material to guide the jury in weighing the testimony of the witnesses attacked and sought to be sustained.

For these reasons the judgment is reversed and the case remanded for a new trial.

UNION AND PLANTERS' BANK OF MEMPHIS *v.* W. M. FARRINGTON *et al.*

1. CONVERSION. *Collateral security.* A conversion is the appropriation of the thing to the party's own use, or its destruction or exercising dominion over it in exclusion or defiance of the owner's right or withholding possession under a claim of title inconsistent with his own.

2. Where F. & W. borrowed money of bank on a note giving stock in gas company as collateral security, which was endorsed in blank, with power of attorney to transfer on the books of the company, under an agreement in the note that the bank might protect itself by sale of the stock, and before note fell due, the bank had the stock transferred to it on the books of the gas company, but not intending thereby to prejudice the rights of F. & W., and afterwards the bank insisted on its right to the dividend declared on the stock and on the right to vote it, but tendered F. a proxy to vote same. *Held*, these facts do not show a conversion of the stock by the bank.

3. STOCKS. Where stock in a corporation is endorsed in blank with power of attorney to transfer on the books of the corporation, and delivered to a bank as collateral security for a note, the legal and equitable title to same passes to the bank.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. R. J. MORGAN, Ch.

CRAFT & COOPER for complainants.

W. MESSICK, HARRIS & TURLEY and GANTT & PATTERSON for defendants.

DEADERICK, C. J., delivered the opinion of the court.

The bill in this case was filed in the chancery court at Memphis, to recover a balance of about $10,000 or $11,000, remaining unpaid upon the following note:

"MEMPHIS, TENNESSEE, March 4, 1874.

Ninety days after date we, or either of us, promise to pay to the order of the Union and Planters' Bank of Memphis eighty-three thousand, two hundred and twenty-eight dollars, for value received, payable at the Union and Planters' Bank of Memphis, with interest at ten per cent per annnm after maturity."

"As collateral security for the payment of this note we have deposited with the said bank 805 shares of Memphis Gas Light Company, and agree, in the event of a decline in the value of said collaterals, to deposit with the same, additional collaterals, from time to time, in such sufficiency that the saleable market value of the entire collaterals shall be at least —— per cent in excess of this debt. A failure to deposit additional collaterals as agreed, or to pay the note at muturity, shall be full and sufficient authority for said bank to sell aforesaid collaterals, at public or private sale, with or without notice, the net proceeds thereof, in whole or in part, as may be necessary, to be applied to the payment of this debt.

WM. B. GREENLAW,
WM. M. FARRINGTON."

The defenses to the suit by answer and cross-bill, are: First, That the bank had converted the collaterals and were liable for their value at the time of the conversion. Second, That by its wrongful act the bank had been the occasion of the loss of a 7½ per cent dividend declared upon the stock, and if not liable for the conversion, it was liable for the amount of said lost dividend. Third, That the bank surrendered certain securities deposited by Greenlaw for said indebtedness, without the consent of Farrington. Green-

law being dead and insolvent. Fourth, That the bank is indebted to Farrington in about the sum of $765 for money paid upon other indebtedness by mistake, in excess of the sum due.

The principal question discussed arises upon the first proposition. The chancellor held that the bank had converted 395 shares of the 805 shares, and was liable for their value, which was par at the time of the conversion. He also held that the bank was liable for the dividend of 7½ per cent, in city notes declared upon the 410 shares not converted, because of negligence in failure to collect said notes, or allow defendants to do so, until they became worthless, and also held that the bank was liable for the said dividend on the 395 shares of stock converted. The chancellor also allowed defendants credit for securities surrendered, and for excess of payment on other indebtedness.

The complainants appealed, and defendants have filed the record for writ of error, complaining that the complainants were not charged with the conversion of the whole 805 shares of stock. The Referees have recommended an affirmance of the decree. Both parties have excepted to the report.

The conversion adjudged consists in the transfer of the stock at the instance of the bank, to its name, on the books of the Gas Company. The argument is, that this divested the title out of the depositors and vested it in the bank. Before this was done the bank held the certificates of stock delivered to it by its creditors, as collateral security, with a blank power of attorney on the back of each certificate, signed by

the parties in whose names the stock and certificates stood, in the following form:

"For value received, —— we hereby authorize —— to transfer to —— —— shares of the capital stock of the Memphis Gas Light Company, on the books of said company.

Witness —— hand, this — of ——, 18—."

(*Signed.*) ——————

Before the note sued on was executed, 410 shares of the collaterals included in the 805 shares already stood on the books of the Gas Company, in the name of the bank, transferred at its instance to it. And this was known to the obligors of the note at the time it was executed.

A conversion is the appropriation of the thing to the party's own use, or its destruction or exercising dominion over it in exclusion or defiance of the owner's right, or withholding possession under a claim of title inconsistent with his own: 2 Greenl. Ev., sec. 642.

Was the transfer of this stock to the bank, at its instance, such a conversion?

The debtors had delivered the certificates of the pledged stock with power of attorney for its transfer on the books of the Gas Company, and by such transfer, in the language of this court in *Cornick* v. *Richards*, "the title passes and is completely transferred, whether in case of collaterals or an absolute sale": 3 Lea, 25.

The same doctrine is subsequently held in the case of *Cherry* v. *Frost*, in which stock with blank certficates was pledged by Cherry to the bank, for a loan of money, and was afterwards pledged by the bank for a loan to it, which latter pledge was held superior

to Cherry's right upon the ground that the deposit of the certificate and blank assignment passed the title, legal and equitable, to the bank: 7 Lea, 1.

These cases show very clearly that the title to the stock was transferred by the debtors to the complainants as completely and as fully by the delivery of the certificates of stock and the blank assignment thereof, as could have been done by the transfer upon the books of the Gas Company. And unless the latter transfer was intended to assert a right to the stock, in defiance of, or inconsistent with the right of, defendants, it could not *per se* operate as a conversion of the stock in such a sense as to make the complainants liable for its value, at the time of its supposed conversion, notwithstanding it may have depreciated before the maturity of the note it was pledged to secure.

We think the record very satisfactorily shows that both parties regarded the transaction in the light in which it was viewed at its inception—a pledge of stocks to secure a debt. On the one side a right to sell the stock at the maturity of the note for the satisfaction of it, if not then paid. On the other, the rights to a surrender of the stock if the note was paid at maturity. Defendant Farrington, however, although he knew that the 395 shares of stock had been transferred upon the books of the Gas Company the day after it was done, and objected to it, or complained of it, still treated it as a pledge of the stock until a few days before the maturity of the note. He insists that he then learned that the bank had no

right to transfer the stock to itself on the books of the Gas Company, and maintained thereafter that by that act they had converted the stock and were liable to account for its value at the time of the conversion.

He does not pretend that the bank claimed the absolute title to the stock, nor that they denied his right to redeem it, nor that the bank insisted upon any other right in respect to the stock itself than that stipulated in the original contract. But as evidence of the conversion, defendants say that the bank insisted upon their rights to the dividend declared upon it, while held by it, and that they claimed the right as owner to vote it, although they tendered to him a proxy authorizing him to vote the stock. These facts are relied upon to show a conversion. We do not think they are sufficient to establish any intention upon the part of the bank to set up a claim of title to the stock, inconsistent with the rights of the defendants to pay the debt and redeem it.

The bank may have been mistaken as to its rights in respect to the dividends declared upon the stock while held by it as a security for their debt, and as to their right to vote upon it. How this is, it is not in our view necessary now to determine.

The question of conversion is a mixed one of law and fact. But we do not think a mistake as to the legal rights growing out of the transfer of stock as collateral security, can be held to be of itself sufficient evidence of a conversion. Obviously, no such purpose was entertained by complainants, nor until shortly before the sale of the stock was any such idea enter-

tained by defendant Farrington. The bank continuously held the stock pledged up to the time of the sale. It was therefore always ready and willing to comply with its obligation to reconvey the stock on the payment of the note. And the fact of the transfer on the books of the Gas Company to it, presented no impediment in the way of the fulfillment of its contract. This transfer was made to more certainly secure the objects of the contract, and not to prejudice the right of defendants to a return of the stock upon the payment of the note. The bank desired to protect its claim to the stock that it might more certainly have it to return when the note was paid. That it sought or intended to deprive defendants of any benefit of their contract to have the stock returned upon payment of the note, there is not the slightest reason to believe. This is exactly what defendants contracted for, and what they have a right to demand. If the complainants have sought or claimed more than they are entitled to, their claims should be disallowed and they should also be held to account for any injury imposed upon defendants. But we do not think either party apprehended or intended any conversion of the stock by complainants. And upon this point we hold that the report of the Referees and decree of the chancellor are erroneous and should be set aside, and that the complainants should have a decree for the amount of their note and interest, subject to the credit for the net proceeds of the sale of the stock, and other credits hereinafter mentioned. The amount of the dividend declared by the

Gas Company, payable in city notes, the complainants must account for, because it claimed to be entitled to the dividends on the pledged stock and prevented the defendants from receiving it, and it must receive it in the city notes, because it is clear it was declared upon the condition that it should be so payable, and otherwise would not have been declared.

The security improperly surrendered by the complainants in compromise of the Goodman bill, should also be credited to defendants as well as the excess paid in settlement of Myers & Co.'s claim by Farrington. With this modification as to the alleged conversion the chancellor's decree will be affirmed, and the costs of this court will be divided equally between complainants and defendant Farrington.

JOHN A. KIRBY *v.* THE PHŒNIX INSURANCE COMPANY OF MEMPHIS, TENNESSEE.

1. FIRE INSURANCE. *Change of risk. Evidence. Custom.* In an action on a fire insurance policy issued while the premises were occupied providing that material changes of risk or ownership should be notified to the company, and assented to in writing, the house having burned while unoccupied, it was held not to be error for the court to allow the defendant to prove that there was a general custom of insurance companies doing business at the place where the property was situated, never to take a risk on vacant or unoccupied property.

2. CANCELLATION. A fire insurance policy may be cancelled independent of its stipulations by the mutual parol consent of the insured and insurer, although the unearned premiums are not refunded.

3. WAIVER. A stipulation in a fire insurance policy that in case of cancellation during the life of the policy by the insurer the unearned premium shall be refunded *pro rata* is for the benefit of the insured, and he may waive it.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby county. J. O. PIERCE, J.

J. E. BIGELOW for Kirby.

U. W. MILLER for Insurance Company.

DEADERICK, C. J., delivered the opinion of the court.

This cause was before this court at its April term, 1882, upon appeal in error by plaintiff from a judgment of the circuit court of Shelby county. The judgment was reversed and the cause remanded for a new trial for error in the admission of the evidence of experts, "that it was a material change of risk for insured property to become vacant during the life of the policy," objections having been made to the testimony. This court holding that the expert testimony was not sufficient to establish, that it was a material change of risk, but that the case was susceptible of proof of facts making it so.

At September term, 1882, of the circuit court, verdict and judgment were again rendered against the plaintiff and he has appealed in error to this court.

The Referees have reported recommending a reversal of the judgment, and the defendant has excepted to the report. The exceptions open the case for the exam-

ination of the reasons leading the Referees to their conclusions.

The suit is founded upon the insurance by defendants of a house in Memphis, as the property of plaintiff. The policy is dated May 27, 1878, and expired May 27, 1879. The house was burned March 31, 1879. It was occupied at the time of insurance, as recited in the policy, by a good tenant, and was unoccupied at the time of its destruction, and had been for about two months.

Defendants insist it is not liable, because the house was allowed to become vacant during the life of the policy, and was destroyed while vacant, and because the policy was cancelled by the parties before the fire. The third clause of the policy provides that all material changes of risk or ownership, shall be notified to the company and assented to in writing. The defendant was allowed, over the objection of the plaintiff, to prove that there was a general custom of insurance companies doing business in Memphis, never to take a risk on vacant and unoccupied property.

This, the Referees report, was in substance a repetition of the error, for which the judgment had been reversed by this court at a former term; that it was allowing the witness to testify in a different form of words; that it was the opinion of the experts that it was a material change of risk to allow insured property to become vacant. Although there is plausibility in the reasoning by which the proposition is maintained in the report, yet the cases are not identical. In the first case it was held that the mere opinion of the

expert witnesses, without facts to support it, was inadmissible. In the last the evidence goes to establish a fact as to the existence of a general custom of the insurance companies, not a mere naked opinion of experts or others.

And in the question of whether there is an increase of risk where a house was occupied when insured and afterwards became vacant, a general custom of insurance companies to charge a higher premium on unoccupied dwellings, is admissible: May on Insurance, page 720, sec. 582. And upon the same principle the general custom to refuse snch risks, is admissible. These customs being facts tending to show increased risk.

But the question most earnestly argued before us is, was the policy cancelled, or rather was the charge of the court correct in respect to this question, and is there sufficient evidence in the record to sustain the verdict? The court charged the jury that the clause in the policy giving the defendants the right to cancel the policy by giving notice and paying back a *pro rata* portion of the premium for the unexpired time of the policy, could only be available to defendants by the payment or tender of the *pro rata* of the premium, and unless the defendants did pay or tender said sum it would not be a cancellation. The court further said: "But independent of this clause in the policy, it was competent for the parties to cancel this policy by mutual consent and agreement between them, and if the jury find from the evidence, that by agreement between the plaintiff and the secretary of defendants, the policy was in fact cancelled, the minds of

both parties then meeting in accord on the proposition to cancel it then and there, this was, in law, a cancellation of the policy at the time, and the policy was then at an end, and if this was done before the fire occurred, the plaintiff cannot now recover on the policy whether the unearned premium was paid to him or not." The court further charged, that: "The condition of the policy, that in case of cancellation by the act of defendants, the unearned premium must be paid to plaintiff, was a condition for plaintiff's benefit which he might waive. And if the jury find that before the fire occurred, the defendants undertook to exercise its right of cancellation under the clause in the policy, and did all that was necessary, except to pay the unearned premium, and the plaintiff, by his words or by his silence, when he should have spoken, waived such payment, or that he by his absence from Memphis, or otherwise actually prevented the payment, then such payment by defendants was excused and the cancellation was complete." But the court said: "No person can be held to have waived his rights unless he understands he is waiving them," etc.

On February 26, 1879, the plaintiff came into the office of defendant, and the secretary of the company told him that his house was vacant and asked him if he expected to get a tenant soon. Plaintiff replied he did not think he would, and did not know when he would get a tenant. The secretary then said the company was unwilling to carry risk on vacant and unoccupied property. Plaintiff replied: "Very well; cancel the policy," and left the office, as

witness supposed to get the policy, and never returned, having left the State the same day and not returning until after the fire. Another witness testified that the secretary asked plaintiff if he expected to get a tenant soon, to which plaintiff replied: "I don't think I will; I don't know when I will get a tenant." The secretary then said: "The company is unwilling to carry risks on vacant and unoccupied property." Plaintiff replied: "All right," or "very well; cancel the policy;" or, "consider it cancelled." Secretary said: "Bring in your policy and get your unearned premium," to which plaintiff replied: "All right," or "very well."

The plaintiff testified that the secretary said to him: "Your house is vacant; do you expect to get a tenant soon?" Witness replied he did not think he would. The secretary then said: "The company cannot carry risks on vacant property, and will have to cancel your policy." Witness replied: "All right," or "very well," and left, etc.

Plaintiff said he did not say "cancel the policy or consider it cancelled." Plaintiff insists that the facts disclosed in the record do not sustain the finding of the jury, and that the judge's charge was incorrect in holding that the parties might, by mutual agreement, waive the payment of the unearned premium, and cancel the policy.

The case of *Hollingsworth* v. *Germania Insurance Co.*, 45 Ga., 294, reported in 12th American Reports, with other cases therein cited, is relied upon as sustaining the view maintained by plaintiff. In that

case the insurance was effected in Rome, Georgia, on goods in Gadsden, Alabama. The company elected to cancel the policy and its agent notified the assured to forward the policy for cancellation to Rome, and he would refund the unearned premium. The policy was forwarded and received January 17th or 18th, with instructions to pay the unearned premium to the assured's agent in Rome. This was not done until February 27th next thereafter, and in the meantime the goods were burned, and the Insurance Company was held liable. The court held that the company had failed to comply with their contract to refund for more than a month, after plaintiff had done all that was required of him, and it was not pretended that they had tendered the money.

The defendants maintained that after the agreement to cancel, their liability ceased. But the court held it did not, until a tender was made. The proposition by the company was, that plaintiff should return the policy and then it would refund the money. But after the company received the policy they waited more than a month, and until after the loss, although unknown, before the money was paid. There was no impediment in the way of the payment when the policy was received. The agent of the assured was in Rome, ready to receive the money. The facts in that case do not raise any presumption that the parties intended or agreed to cancel the policy in any other way than that prescribed by its stipulations and provisions.

The case of *Van Valkenburgh* v. *Lenox Fire Insu-*

rance Company, 51 New York Rep., is similar in most respects to the case just cited. In both cases the rights of the parties depended upon whether the stipulations of the policies had been observed. The question of a parol rescission or cancellation did not arise. But such a contract may be cancelled by mutual agreement of the parties, independently of the stipulations of the policy itself, and whether there was a cancellation is a proper question for the determination of the jury, under the instructions of the court.

His Honor, the circuit judge, in this case, instructed the jury that the policy required the payment back of the unearned premium, before the company could insist that the policy was cancelled. But he also instructed them, if the parties so agreed, they might independently of the provisions of the policy for its cancellation, by mutual consent, cancel it, and waive the exact performance of the stipulations, which are required by the policy to be performed, before either party could insist as matter of legal right, that the policy was cancelled. And his Honor left it to the jury, under clear and explicit instructions, to say whether the parties had agreed to consider the policy cancelled, and had waived the immediate payment of unearned premium on the one hand and surrender of the policy on the other, as conditions precedent to the cancellation. The jury have responded to this issue in favor of the theory of the defendant, and we are of opinion that there is sufficient evidence in the record to sustain their finding.

Furthermore, we see no reason why the party,

whether plaintiff or defendant, may not waive a right secured to him and for his own benefit. In issuing the policy, which requires prepayment of the premium in order to its validity, the company may raise the prepayment as a condition precedent. And it has been held that the delivery of the policy, without exacting payment, raises the presumption that a credit is intended: May on Insurance, pages 433–4, sec. 360. The same rule would apply in the case of a cancellation or rescission.

There is no error in the record for which the judgment should be reversed. The report of the Referees will be set aside, and the judgment affirmed.

13L 348
16L 690

THE CHESAPEAKE, OHIO & SOUTHWESTERN RAILROAD COMPANY *v.* THE STATE OF TENNESSEE *et al.*

TAXATION. *Assessment.* Under act of 1879, ch. 79, property should be assessed at its value on the 10th January for any year. It seems that if property changes hands after 10th January, an assessment under act of 1879, ch. 79, in the name of the subsequent owner, would be valid, and fix a lien upon the property.

FROM LAUDERDALE.

Appeal in error from the Circuit Court of Lauderdale county. THOMAS J. FLIPPIN, J.

STEELE & STEELE for Railroad.

W. E. LYNN and JAMES OLDHAM for State.

FREEMAN, J., delivered the opinion of the court.

The contest in this case is on an assessment made by the County Trustee of Lauderdale county, on December 27, 1882, on the road-bed and franchise of the railroad company, on the ground that the same had not been before that time assessed. The assessment was on twenty-six miles of road, valued by the Trustee at $5,000 per mile, making an aggregate value of $130,000 on which the company is sought to be charged for State and county taxes. The State seems to have been dropped out of the case, and only the county assessment is now in contest.

Notice having been given to the agent of the railroad, a contest was had under the act of 1879, chapter 79, before the Chairman of the County Court, who modified the assessment, but gave judgment against the company. Thereupon a petition for *certiorari* and *supersedeas* was filed, and the case brought to the circuit court, where, on motion of defendant, the county, the petition was dismissed, and the company brings the case to this court by appeal.

The case made by the petition is as follows: "That while it now owns in Lauderdale county twenty-four miles of completed road, that said road-bed was only finished in July, 1882, and been operated from that time; that by law, property was required to be assessed on the 10th of January for the year 1882, and this company had only become owner of the road on the 26th of January, 1882—the road having been origi-

nally chartered in 1857–8 as the Mississippi River Railroad Company, and had changed hands (or names), several times, until it became the property of the present company at the time stated. That at the date for assessment of property for 1882—10th of January—petitioner did not own any localized property in Lauderdale county, nor did it own the road-bed, nor right of way until the 26th of January, 1882. That when it became the owner of the road it was not in operation, nor built in Lauderdale county, only part of the road-bed, about ten miles been thrown up. It is further stated, that petitioner, on the 10th of January, 1882, owned no property in Lauderdale county, except the releases from four or five land owners of right of way over their lands; not a mile of road finished or a single rail laid down, consequently no car or locomotive had ever been on the road in this county."

There are other matters stated intended to raise other questions, that need not be noticed at present. It is seen the question before us is the validity of the assessment made in December, 1882, by the Trustee, afterwards with modifications by the Chairman of the County Court. If this be invalid, the court should have simply quashed it, as what further steps may be taken in that event to assess, if liable, it is not necessary to discuss or decide.

By the law as it existed when this assessment was made, it was the duty of the officer assessing property for State and county taxation, "to assess the property to the person owning or claiming to own the same, on the 10th of January of the year for which the

assessment is made, if known, if not, then to unknown owners": See Rev. Acts, App. to Code, sec. 583*a*, sub-sec. 4.

The act of 1879, for the "more rigid collection of the revenues," section 1, makes all collectors of taxes and assessors "to assess all property which by mistake of facts, has not been assessed," and then makes it the duty of such collectors in all cases where property has not been assessed, but on which taxes ought to be paid by law, to assess the same and proceed to collect the taxes, etc.

This means only that the collector shall do what ought to have been done at the period fixed by law, and assess the property as it ought then to have been assessed. We do not say that the assessment would be void to the present owner, as it could make but little difference if properly assessed, the taxes becoming a lien on the property, but that the property, as it then existed, and at value then, is what is intended.

It appears clearly, in this case, the road-bed did not exist in this county, and the franchise to operate a road was of but little value probably, at this period. The property assessed has been made since, and the value added by labor and expenditure of money. This property goes into the assessment of the next year, but cannot be added for taxation for the year 1882. It would make an inequality of taxation in many cases, not intended by the Legislature. The property of all other owners is assessed at value on the 10th of January. In many cases valuable improvements may have been made, adding double or thribble

to its value during the year, yet there could be no increase or change of assessment in such a case. Why should this company be taxed on a different principle, when it did not own the property on the 10th of January, 1882, therefore in no default? No reason appears. No increase of value in this way is directed by the statute, and none can be allowed.

We need not discuss other questions, as the *certiorari* was the proper remedy in such cases, perhaps the only one.

We but add, that the probability is that the mode of assessment provided by the Legislature, after the decision in the *Chattanooga* case, would be the only mode of assessing the road-bed and what is known as the distributable property, by the law of the State. It is, however, only necessary to decide that the assessment now before us is invalid and not according to law, and the petition had merits in its statement of facts. The court erred in dismissing it, the judgment will be reversed and case remanded to be proceeded with under this opinion, with costs.

M. J. WICKS and WIFE *v.* J. P. CARUTHERS *et al.*

1. DEED OF TRUST. *Rights of Beneficiaries.* Where a trustee under a deed of trust on land made to secure three notes, one of which is held by a third party, sells to pay only two of the notes in the hands of a party who bids his debt on the land, and the trustee conveys to him, the effect is the purchaser buys subject to the rights of the third party with knowledge, and holds the land subject to the rights of the third party, and neither the purchaser nor the trustee are personally liable to such third party in the absence of fraud. But if the land is afterwards sold to an innocent purchaser for value, the purchaser at the trustee's sale is then personally liable to the third party holding the note.

2. CHANCERY PRACTICE. A court of equity will not attempt to compel a party to convey land unless he is a resident within the territorial jurisdiction of the court, although process was served on him while he was within the jurisdiction of the court.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W. W. MCDOWELL, Ch.

J. W. CLAPP for complainants.

HENRY CRAFT for defendants.

FREEMAN, J., delivered the opinion of the court.

The facts on which the solution of this case mainly depends are as follows: In 1870, C. S. Severson executed his three promissory notes to Malcolm McNiel, a resident of the State of Kentucky. Two of these notes were for $5,000 each, the other for $10,000. At the same time Severson executed a deed of trust

to secure the payment of said notes, (John P. Caruthers who was served with subpœna in Shelby county, being the trustee, but said, and shown to be a resident of Chicago, Illinois), authorizing a sale of the property therein conveyed in default of payment; said property consisted of a large tract of land and farm thereon in Coahoma and Bolivar counties, Mississippi. The first two notes were due in six and twelve months, and the last twenty-four months after date. Severson afterwards encumbered the land with another deed of trust, and probably other encumbrances had been fastened, or attempted to be fastened on it. Be this as it may, the land was sold under the junior deed of trust referred to, and purchased by M. J. Wicks. It is not denied that this purchase was subject to the prior encumbrance in favor of McNiel.

M. J. Wicks, after this entered into an agreement in writing with McNiel, the substance of which we copy, so far as it bears on the questions to be decided. After reciting the facts we have stated as to the notes and deed of trust, and purchase by Wicks of the land under the junior encumbrance, of Maynard, the trustee, in favor of Hill, Fontaine & Co. by Wicks, it is added "and wishes to avail himself of any benefit to be derived from the lien under the deed of trust to said Caruthers for the benefit of said McNiel. Now, therefore, this agreement witnesseth, that in consideration of the transfer and assignment by the said McNiel to said Wicks of the notes of said Severson above mentioned, and the lien of the

said deed of trust, in the manner hereinafter stated, the said Wicks agrees and binds himself to become the purchaser of said notes without trouble, delay or expense to said McNiel as follows: That is, that he will on 27th day of April, 1873, pay to said McNiel or his order the amount that may then be due on the first note of Severson, with accruing interest at eight per cent. per annum, as stipulated in said notes, less the sum of one thousand dollars to be deducted as of date April 27, 1872; and on the 29th of December, 1873, he will pay to said McNiel or his order the amount then due on the second note of said Severson for $5,000, with interest as therein stipulated; and on 27th of December, 1874, he will pay in like manner the amount due on the last note, $10,000, with interest. He then further bound himself that Severson shall discharge a decree in the chancery court at Memphis, on a certain lot in said city, which had been conveyed by Severson and wife to McNiel. Then comes the stipulations of McNiel as follows: "In consideration of all which the said McNiel agrees and binds himself that he will not sell, transfer or dispose of the notes of said Severson above described to any other person than the said Wicks until after the lapse of thirty days from the time when the said Wicks is by the term of this agreement to pay to said McNiel the amount due upon the same respectively, and he will upon receiving from said Wicks the amount due upon said notes respectively as hereinafter stipulated, assign, transfer and set over to said Wicks each one of the said

notes at the time the amount due thereon shall be received from said Wicks, together with the lien secured by said deed of trust, but without personal recourse upon said McNiel, and when the *last* of said notes shall be assigned as above provided, the said McNiel will, so far as he can do so, substitute the said Wicks to all the rights and benefits secured to said McNiel by virtue of said deed of trust. But it is expressly understood and agreed that if the said Wicks shall fail to pay said McNiel the amounts due upon said notes respectively at the times herein above designated, or within thirty days thereafter, then the said McNiel may elect to consider this agreement as at *an end*, and may dispose of any or all of said notes, not before *then* assigned to said Wicks, as he may wish, or may proceed to enforce the provisions of said deed of trust for the purpose of collecting the amount then due on said notes."

It is then stipulated that Wicks shall pay taxes and do some other things, among which is to keep the title protected until the agreement is performed, "the said Wicks supposing the lien of said deed of trust to be now prior and paramount to all others." The notes were to be presented at a specified bank in Memphis as they fell due. The date is October 5, 1872. At the date of making this agreement there is no doubt that M. J. Wicks expected, and with good reason, to be able to meet his engagement to take up the notes. But owing to the suspension of the bank of which he was president, and probably use of his private means to pay depositors when

the first note fell due, on 27th and 30th of April, he was unable to do so. He had left the city at that time, making no provision for its payment, and was expected to be absent for some time. McNiel seems to have been anxious to realize his money to meet his own engagements, and had relied on getting this money for the purpose. He sent his grandson as his agent to Memphis for the purpose of collecting the money on the Severson note, as assumed by Wicks. His, Wicks' wife, and his son, as we take it, a young man, but in business as partner of his father, says he was the agent of his mother, and was familiar with the facts in connection with the purchase of the land by his father, as well as the terms of the agreement between McNiel and him as to taking up the notes. When McNiel urged payment, and learned it had not been provided for, the son told him he would see if he could not make some arrangement by which he could get his money. He says his mother was entitled to, and had enough money in another bank to pay the note, the money deposited in the name of the husband. It had been derived, as he says, from a sale of land in Texas, conveyed by his father to his mother in consideration of the fact that he had as trustee of his wife used Memphis & Charleston Railroad stock of his wife, and this conveyance was to make this good. What were its terms we do not see, as the deed is not in the record. It might be a sinuous question on this statement of the facts as to whether this money, the result of sale of real estate, was the money of the

wife, nothing more appearing under the principle of the case of *Cox* v. *Scott*, Legal Rep., vol. 2, 119.

But as no such question is made by the learned counsel, we pass this without deciding any thing either way on the point suggested.

The theory of complainant is, that the mother, under the advice of her son, purchased the note with this money, paying what it called for on its face, with accrued interest, the total being $5,275.50, and that as such purchaser she takes the note with the security of the deed of trust independent of the agreement between McNiel and M. J. Wicks, the husband.

It may have been that she and her son and agent so understood it at the time, but it is equally certain that Malcolm McNiel, the agent of the owner of the note, had no such understanding; on the contrary, it is clear he simply understood the note was being paid, and that the son had obtained the money for his father, and met his engagement. In this view we may say here that complainant's theory can receive no aid based on the idea of an assent or agreement on the part of McNiel that she was a purchaser simply of the note. It is beyond doubt that he had no knowledge of the fact that she was to be the owner of the note or have any rights in it in any way. The note was simply endorsed "without recourse on me or my heirs, Malcolm McNiel, by Malcolm McNiel, Jr., agent," he refusing to endorse it in blank as requested, and endorsing it as directed by his grandfather. It now becomes necessary to state the case as presented by the pleadings.

When the second note became due default was made in paying it, and thereupon McNiel required Caruthers, the trustee, to advertise the land for sale to satisfy this and the last note, as provided in the agreement. Thereupon Mrs. Wicks and her husband filed the original bill to enjoin said sale.

This bill states the agreement or substance of it, and charges that the husband had been unable to comply with his agreement, and had abandoned it, and she had taken up the note with funds belonging to her in her individual right," and therefore she asserts the equity to have a beneficial interest to the extent of the note, and whatever interest McNiel had under said deed of trust before said note was paid to him passed to her. On this footing she prayed that Caruthers be restrained from selling the land without first providing for said note under a proper advertisement, etc.

This bill was demurred to on several grounds, among others, want of equity on its face, and the demurrer sustained, and bill ordered dismissed, with leave to file an amended bill.

In the meantime, when the bill was dismissed and injunction dissolved, the trustee proceeded to sell the land, when McNiel became the purchaser, bidding his debt, and perhaps costs, amounting to upwards of twenty-one thousand dollars, and took a deed from the trustee.

Soon after this McNiel died in Kentucky, leaving a will, which has never been probated here, in which this land is devised to parties assumed to be before

the court under an amended bill filed by Mrs. Wicks. This amended bill goes on the theory and charges the facts to be that complainant, S. A. Wicks, bought the note as a simple investment, had never seen the contract between her husband and McNiel, had nothing to do with that contract, but had been advised that she would acquire equal rights in proportion to her debt under the deed of trust with McNiel, and so be entitled to enforce the note as a charge on the land.

It then charges that since the dissolution of the injunction, the master had sold the land under the deed of trust for the benefit of McNiel, not noticing her rights, and McNiel had bought the land, and had the trustee's deed. She charges that her rights under the trust have not been impaired by this sale, and the sale void as to her, but has delayed her in the collection of her note, and was a fraud on her rights. On this footing she claims that McNiel and the trustee are personally liable to the payment of the whole of complainant's debt, and she entitled to the payment of the note out of proceeds of the land. On this she asks a personal decree for the amount of the note, payment also out of the proceeds, and if the decree is not satisfied otherwise, then the sale be declared void, and the court order a resale according to the terms of the deed of trust for the payment of the debt.

The chancellor held her entitled to a *pro rata* share of the proceeds, gave a decree against an administrator of McNiel, who had been appointed in

Tennessee, and brought into the case, and then declared that McNiel, by virtue of his purchase, held the lands as trustee, subject to the trusts created by the deed of trust, but reserved any further action on this, but referred to the clerk an inquiry as to whether McNiel made any disposition of the lands in his lifetime, or by will, and what property he had left, personal or real, within the jurisdiction of the court, with other matters not necessary to be noticed.

The Referees report that Mrs. Wicks is entitled to recover the entire amount of her note of McNiel personally or his representative, and also against Caruthers, the trustee, and also give her a lien on the land to be enforced, provided the parties necessary are within the jurisdiction of the court, a point reserved however, who are the present owners of the land, being one of the matters included in the reference ordered.

The land is shown to belong under the will of McNiel to three or four grandchildren, minors, and non-residents of the State of Tennessee, who have had publication made as to them, and an answer by guardian *ad litem*. As we have stated, J. P. Caruthers, the trustee, was served with process, it is true, in Shelby county, but by proof is shown to be a resident of Chicago, Illinois.

We have stated the position taken in the pleadings, and the facts of the case as shown by the proof. It is difficult to say from the amended bill, which is the case of complainant, what is the position of complainant. While a claim is made on the proceeds

of the sale, yet that sale is persistently claimed to be void, and the court asked to so decree it.

A personal decree is sought against McNiel and the trustee for making the sale, and if this does not satisfy the debt claimed, then a sale of the land is asked in accord with and under the deed of trust. How all this is to be reconciled and made consistent we are at a loss to see.

The chancellor has held in accord with these views as to the *pro rata*, and the Referees substantially affirm this decree, only modifying it so as to give a decree for the whole amount of the note instead of a *pro rata* part of price of land at sale. We need but say, that if a personal decree is to be had, and proceeds of land sale given complainant, it necessarily goes on the idea of an affirmance of the sale. McNiel and Caruthers can only be held liable for the money, on the ground that they have received the money of complainant to which she is entitled as money had to her use, or else on the ground that they had wrongfully deprived her of her assumed security under the deed of trust, and therefore must make good her loss. Complainants cannot assume and maintain contrary and antagonistic positions on such a question, and ask the proceeds of a sale, or personal decree, because it had been made, and at the same time treat the sale as void, and enforce rights as if never made. We will look at the case in both aspects suggested, on the theory that by the sale money or value has been received by McNiel rightfully belonging to complainint. Do the facts warrant

this view? It is simply the case, on the theory of complainant, where a trustee holding property subject to payment of three notes, one held by a third party, has sold to pay only two of the notes in the hands of one, and that one has bid his debt on the land, and the trustee has sold to him and conveyed. The only effect of this is, that if the third party, Mrs. Wicks in this case, has the rights of a beneficiary as claimed, which we do not decide, the purchaser has bought subject to them, with full knowledge of all the facts, and holds the land subject to her rights, but those rights are against the land, not against him personally. He has deprived her of nothing, as she was no party to the sale, only got a title encumbered by her debt, and so of the trustee. He seems to have acted in good faith—certainly no bad faith is shown on his part. The chancery court had dissolved the injunction restraining him from selling. He was free to act so far as Mrs. Wicks was concerned, and if he erred in his judgment as to her rights, he is not responsible for that, only for bad faith or fraud.

This act however, has not, if her contention is correct in the slightest degree, affected her rights under the deed, by virtue of her ownership of the paper. She has but to go to the State of Mississippi where the land lies, and file her bill or institute proper proceedings, and enforce whatever right she has acquired against the land. Nothing that has been done has impaired or weakened any right she claims by virtue of the ownership of the note secured by the deed of

trust. The sale is not a decree of a court, binding on all parties to it, and if it was, she was no party to it. If the land had been by McNiel sold to an innocent purchaser for value, then there would be grounds on which he might be charged personally, because this might deprive Mrs. Wicks of her security. The principle of the case of *Coleman, etc.*, v. *Satterfield*, 2 Head, 265, would sustain this relief in such a case. But no such case is made here, the purchaser, McNiel, held the land until his death, it is now in possession of his devisees. There is nothing in the way of complainant's enforcing her rights, if she has them, against the land. She cannot go on McNiel and the trustee on this ground. They have deprived her of nothing. If her theory is correct, McNiel has only got a title, charged with her debt; that is all of it, and so in one part of the bill it is maintained, in fact nothing else is assumed. If so, then he has deprived her of nothing, and neither he nor the trustee is personally liable to her. We, however, distinctly pretermit any expression of opinion on the facts of this record, as to what rights Mrs. Wicks obtained by the transfer of the note to her under the circumstances under which it was received.

Assuming that whatever rights Mrs. Wicks has are against the land—that she got no more by the transfer is certain—McNiel refusing to endorse or transfer except free from all personal liability, the question remains, can this court enforce the right thus claimed, even if sustained? We take it, the land lying in another State is beyond our control, and the parties

must be impleaded in that jurisdiction, when a charge on realty is to be enforced. It is a *quasi* proceeding *in rem.* against the land, and not against beneficiaries and trustees, who are necessary parties only to settle equities between them, in order to ascertainment of what the land is chargeable with, the land after all is alone to be charged and appropriated.

It is true the trustee is before the court by source of process of the court in fact in this case, but is out of the jurisdiction, but that does not give jurisdiction over the land, the subject-matter on which the charge is to be enforced, nor enable the court to compel the trustee to sell or convey. Our decree ordering him to sell, would only give authority in Tennessee, and be waste paper, as soon as he crossed the line of Mississippi, probably, but as he is out of this jurisdiction he cannot be so ordered. A mere declaration of right which we could not enforce, is what a court could not do, a decree which we have no jurisdiction to execute, would be *tristem fulmen* and a useless form not in accord with the course of judicial proceedings nor the dignity of such tribunals.

Courts of equity act *in personam* in most cases, where it has jurisdiction of the person, and compel parties to perform contracts for conveyance of lands in foreign countries, but the essential qualification of the rule is, "if the parties are resident within the territorial jurisdiction of the court: Sto. Eq. J., Ed. by Perry, sec. 743.

"So it seems," says same authority, section 744, "a court of equity has no jurisdiction to order a defend-

ant to sell lands situate in a foreign jurisdiction, when the case would be otherwise within its power." It must have the power to give complete relief in such cases in the principle, which could not be done in this case, the party purchasing could not be placed in possession: *Morris* v. *Reamington*, 1 Pars. Eq. Cases, 387; *Blount* v. *Blount*, 1 Hawks., 365. See also *Telegraph Company* v. *Railroad*, 8 Baxt., 61, citing Leading Cases in Equity, vol. 3, pp. 497, 498.

There is nothing in the contention as *res adjudicata* when demurrer was overruled by arbitration court. The decree simply overruled the demurrer and remanded for answer and further proceedings: *Rodgers* v. *DeBell*, 6 Lea, 69.

The result is, the report of the Referees is set aside, the decree of the chancellor reversed and bill dismissed with costs. It may be added, without prejudice as to any assumed rights of Mrs. Wicks against the land, if any she has.

13L 367
14L 7

THE STATE *ex rel.* *v.* E. A. COLE.

1. CLERKS. *Where one court is abolished and another established.* Where an existing court is abolished, and another court is established over the same territory and with like jurisdiction, and the business of the former is by the statute transferred to the latter, the latter becomes the legal successor of the former, and its officers are entitled to the possession of the books, papers and effects of its predecessor; and so, as often as changes occur.

2. SAME. *Sureties upon bond.* If a clerk becomes his own successor having money in his hands, either as clerk or special commissioner and receiver, the old sureties will be released and the new sureties become liable therefor, and the presumption, in the absence of proof to the contrary is that the money is on hand, and this presumption can only be removed by positive proof to the contrary, or at any rate by the production of the best evidence. The mere fact that the clerk's account in bank was overdrawn at the time is not sufficient, when the proof is clear that there was no defalcation during the first term.

3. SAME. *Same.* Under the provisions of the Code a clerk, who is his own successor, would hold the funds in his hands in the same capacity in which he held them before, either as clerk or special commissioner, and his sureties would be liable accordingly. It would be the same if a succeeding clerk receive funds from his predecessor

4. INTEREST. *Decree of official bond. Appeal.* A money decree of the chancery court, although for the full penalty of an official bond, will carry interest upon affirmance, whichever party appeals.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W. W. MCDOWELL, Ch.

—— ——— for complainant.

—— ——— for defendant.

COOPER, J., delivered the opinion of the court.

By the act of 1870, chapter 28, the chancery court of Memphis was abolished, and its business transferred, in equal proportions, to two chancery courts created for the same district by the names of the first and second chancery courts of Shelby county, Under this act, on June 14, 1870, the defendant. E. A. Cole, was appointed and qualified as clerk and master of the first chancery court of Shelby county, for the constitutional term of six years. By the act of 1875, ch. 23, sec. 2, the second chancery court of Shelby county was abolished, and its business transferred to the first chancery court of Shelby county, which was directed to be thereafter styled the chancery court of Shelby county. On June 23, 1876, the defendant, Cole, was reappointed clerk and master of the chancery court of Shelby county, and qualified by giving three bonds, as required by law. His co-defendants are his sureties on his office bond and on his bond as special commissioner and receiver. The third bond given to cover public revenue which might come to his hands is not in controversy. In November, 1878, Cole resigned the office of clerk and master, and the relator, R. J. Black, was appointed and qualified as his successor. On December 6, 1878, the court made an order upon Cole to pay over to his successor all moneys in his hands by virtue of his late office, and Cole acknowledged service of a copy of the order on the next day. This bill was filed six days thereafter against Cole and the sureties on

his office bond and bond as special commissioner and receiver, given upon his reappointment as aforesaid, to recover any money for which they had become liable. Cole had previously made an assignment to the relator, Black, of his fees of office to indemnify his sureties against loss by reason of their suretyship. One object of the bill was to claim the benefit of this assignment for the creditors who were entitled to a recovery against Cole as an official defaulter. Cole made no defense to the bill, and the sureties raised no issue by their answers except as to the extent of their liability. Upon a reference to a commissioner to state an account with the defendant, Cole, it was ascertained and reported that he was a defaulter to a larger amount than the combined penalties of both of the bonds sued on. The report also showed in detail the various items of liability, distinguishing those derived from sales of property or which came to Cole's hands as receiver proper, and the dates of collection whether before or after his last appointment. No exceptions were filed to the report either as to the amount of the items of liability, the dates of reception, or the sources from which they were derived. The only contest was made by the sureties as to the extent with which they should be charged with these items on the bond given by Cole as special commissioner and receiver. It was and is conceded, that the amounts properly chargeable to the account of the office bond will exceed the penalty of that bond. The only contest is over the liability of the sureties upon the other bond. The

chancellor gave a decree against Cole for the whole amount reported, and against the sureties for the penalty of the other bond, giving the sureties a preference under Cole's assignment of his fees for their indemnity, any surplus to be applied to the payment of the creditors. The complainant has brought the case up by a general appeal, and the sureties by a writ of error. The Referees have reported that the sureties should be charged with several items upon the bond as special commissioner and receiver, in addition to those charged by the chancellor, and the sureties have excepted.

The contest of the sureties is over the following items, with which the Referees have reported that they should be charged upon the bond of Cole as special commissioner and receiver, viz:

First, Amount received by Cole during his first term of office, being the proceeds of sales of property made by him during that term.....$7,210 62

Second, Amounts received by Cole during his second term of office from the following sources:

Proceeds of sales made by A. Alston as clerk and master, etc., of the chancery court of Memphis.....$ 939 45

Proceeds of sales made by M. D. S. Stewart as clerk and master of the second chancery court of Shelby county..... 438 81

Proceeds of sales made by Cole himself during his first term 6,475 09

One objection made to all of these items, although not much pressed, is that the sureties on the bonds, under the last appointment of Cole as clerk and master, can only be held liable upon the ground that Cole was his own successor, and also the successors of Alston and Stewart, whereas he was, under his first appointment, as well as the other officers named

respectively, clerk of a different court from the court under which he was last appointed. The position is based upon the fact that Alston was clerk of the chancery court of Memphis, Stewart of the second chancery court of Shelby county, and Cole, during his first term, of the first chancery court of Shelby county, while under the last appointment Cole was clerk of the chancery court of Shelby county. The last change by the act of 1875 was, as we have seen, merely in name, and the other changes, although in form more, were in substance the same. Each of these several courts was for the same chancery district, and possessed precisely the same jurisdiction, namely all the equity jurisdiction of the chancery courts of the State for the particular territory. The pre-existing court was abolished, and the new courts or court took, by express transfer, all the pending business of its predecessors. There was only a change of names and officials, not of jurisdiction or business. Each following court was in legal effect the successor of that which went before, and its officers were entitled to the possession and control of the books, papers and effects of its predecessor, and to enforce their delivery either summarily under the statute, Code, sec. 806, *et seq.*, or otherwise. The Legislation making these changes fairly implies, even where it is not so expressed in words, that the new court and its officers were the successors of the pre-existing court and its officers.

It is next insisted as to the first of the above named items that the defendant sureties are not liable

therefor, because the proof shows that no part of the money was on hand at the date of the execution of the bonds under the re-appointment of June 23, 1876. It is conceded that, under our decisions, if a clerk pay over money in his hands to his successor in office the liability of the first for such money is ended, and the latter becomes bound; and, in analogy, that if the clerk becomes his own successor, having the money on hand, the old sureties will be released and the new sureties become liable. And the presumption, in the absence of proof to the contrary, is that the money is in hand at the commencement of the second term: *Yoakley* v. *King*, 10 Lea, 67, 72; *Bowen* v. *Evans*, 1 Lea, 107; *Smalling* v. *King*, 5 Lea, 585. The proof in this case shows that there was no official default by Cole during his first term. The witness, Black, who was Cole's clerk from his first appointment until he went out of office, and kept his books and financial accounts generally, but did not control his bank account or deposits, testifies that after 1872, Cole kept his accounts with various banks, naming them. "But," he adds, "on June 23, 1876, when he was re-appointed clerk and master, he was keeping his book account alone, I think, with the Fourth National Bank of Memphis. On that day his account was overdrawn to the amount of $1,781.29. After that time he kept his account solely with the Fourth National Bank, and continued to do so until the day I left the office, August 1, 1878. The above statement is made from my knowledge of his business at the office, and not as to private business out-

side of the office. He may have had other accounts independent of those as clerk and master. I only have reference to those I was conversant with." This is the only evidence to rebut the presumption that the money was on hand at the commencement of the second term. All that can be said of it is that it states a fact from which an inference may be drawn in favor of the contention. But we do not think the rights of creditors should be made to depend upon inference. If they were to sue the first set of sureties, those sureties might prove by Cole that the money was on hand at that time, and thus deprive the creditors of all remedy. It was incumbent upon the present sureties to introduce the best evidence of the fact in controversy, or at any rate satisfy the court that it was not their fault that the best evidence was not produced. The objection is, therefore, not well taken.

A more difficult question, in view of one of our decisions, is whether the items in controversy as above specified are chargeable to the sureties upon the bond of the principal as special commissioner and receiver, or on the office bond. The office bond is in the penalty of $10,000, conditioned to safely keep the records of the court, and faithfully discharge the duties of his office." The other bond is in the penalty of $30,000, and conditioned to "faithfully account for all property and funds which may at any time come into his hands as special commissioner or receiver, and shall truly and faithfully deliver and pay over such property and funds to the persons who

may be entitled to the same." To intelligently dispose of the questions made in argument, it will be necessary to review our legislation and decisions on the subject.

By the act of 1794, ch. 1, which antedates the formation of our State government, clerks of court were required to give bond "for the safe keeping of the records and the faithful discharge of the duties of his office." In this state of the law, and with only such a bond, a clerk and master of the chancery court was authorized by order of the court to receive certain money, and by the same order was appointed receiver and directed to loan the money at interest. The clerk received the money, but failed to loan it. This court held that he and his sureties on his official bond were liable for the money, because it did not appear that he had done any act as receiver: *Waters* v. *Carroll*, 9 Yer., 102. It was said by Judge Reese, in delivering the opinion of the court, that in England a receiver is an indifferent third person appointed by the court to receive the rents of lands pending litigation, who is usually selected by the master, before whom he passes his accounts, and is ordinarily required to give security. "In the constitution of our courts of chancery," he said, "we have united the office and duties of master, so far as they exist under our system, with those of clerk; but no statute has been passed to annex the office and duties of receiver to those of clerk and master." He then notices the existence of a practice in our chancery courts of sometimes appointing the

clerk and master a receiver in those cases in which it was supposed the latter office would least interfere with the proper discharge of his other duties, owing to the limited number of persons qualified to act as receivers, and suggested the advisability of discontinuing the practice.

The practice was, however, not discontinued, and the Legislature afterwards passed the act of 1849, ch. 150. By the first section of this Act, the clerks of the circuit, chancery and supreme court, and their sureties upon the bond given under the act of 1794, were made liable under the bond for all money that may come into their hands by virtue of their appointment by the court as special commissioners to sell property, or as receivers. The second section made it the duty of the judges of those courts to require the clerk to execute a bond in such sum as the judge may deem sufficient, conditioned for the faithful accounting for and paying over of all such sums as may come into their hands as such special commissioners. In *Williams* v. *Bowman*, 3 Head, 679, the liability of a clerk of the circuit court was considered, who had given bond as required by the second section of the act, and who had sold property by order of the court and retained and collected the notes after he went out of office. The court held that the act did in some sense annex the office of special commissioner and receiver to that of clerk, but not so as to merge the former in the latter, and that the duration of the appointment of special commissioner not being limited by law, it might con-

tinue beyond the term of the office of clerk if a successor be not appointed by the court. The clerk and his sureties were therefore held liable upon the bond as commissioner, for the money collected. The correctness of this ruling is recognized in *Horton* v. *Cope*, 6 Lea, 155, 159, and *Yoakley* v. *King*, 10 Lea, 67, 73.

The act of 1852, ch. 164, required all clerks of court to give a special bond to faithfully account for and pay over as the law directs all money which may come to their hands by the sale of property under orders of the court. By section 3, the court might declare the office vacant if the clerk refused to give the bond. In the *State ex rel.* v. *Blakemore*, 7 Heis., 638, 654, the learned Judge who delivers the opinion of the majority of the court, says that the office of commissioner is by this act made a part of the office of clerk, but the requirement of a special bond must be taken as a merger of all liability under the bond of office for his duties as commissioner into the new bond. And yet, curiously enough, he held the clerk and his sureties liable on his bond of office, which covenanted for the faithful discharge of his duties as clerk and master, "for the proceeds of sales made by his predecessor which fell into his hands upon succeeding to the office, and for all moneys that came into his hands otherwise than by sales made by him, and for any moneys which, though they came into his hands as commissioner, were nevertheless retained under the orders of the court, and

converted into a trust fund, and which he failed to account for." The bond executed in this case as a commissioner was conditioned "to well and truly pay over and account for all moneys that shall or may come to his hands upon sales of property *made by him* under the orders and decrees of said chancery court." The limitation of the liability to the proceeds of such sales as were made by the clerk himself compelled the court, if it would not leave suitors without redress, to include every other liability under the bond of office. This might well have been under the first section of the act of 1849, the clerk having failed to give a proper commissioner's bond, but the learned judge considers that act repealed by the act of 1852. The rationale of the decision is left in grave doubt. The real question in the case, which overshadowed every other, and upon which the judges differed, was whether the sureties could claim credit for the payments made by one of them, the father of the clerk, without special reference to the bond.

The Code provides, section 320, that each court shall have a clerk "whose duty it is to attend the court, and perform all clerical functions thereof." By section 326 every clerk is required to give bond "for the safekeeping of the records, and for the faithful discharge of the duties of his office;" and by section 327, also a bond "to account for and pay over all moneys arising from taxes on suits, fines and forfeitures;" and by section 328, a bond also "to cover property or funds which may, at any time, come to

the hand of such clerks as special commissioners or receivers by appointment of the court, or any judge thereof." By section 329, it is provided that in the absence of such special bond the clerk and his sureties will be liable on the regular official bond for all property or money with which such clerk may be properly chargeable as special commissioner or receiver, and the failure to execute a special bond shall not subject the clerk to any penalty. By section 330 the court is authorized to require special bonds to meet particular exigencies. Section 335 is: "The official bonds of clerks, executed under the provisions of the Code, are obligatory on the principal and sureties for every wrongful act or failure of duty in his official capacity, whether the act or duty is embraced in the condition of the bond or not, or grows out of a law passed subsequently to its execution." See also sections 771 *et seq.*, for other provisions regulating the obligation of official bonds. Section 805 is: "In all cases in which it is not otherwise expressly provided, when any office is vacated, all books, papers, property and money belonging or appertaining to such office, shall, on demand, be delivered over to the qualified successor." The subsequent sections provide a summary remedy for enforcing such delivery. These provisions, it will be noticed, are applicable to all clerks of court.

These provisions plainly show a legislative intent that clerks of court, in addition to what the Code, sec. 320, denominates the "clerical functions" of the office, may be appointed to perform, and may per-

form the duties of a special commissioner or receiver. They also provide for the protection of suitors who may be aggrieved by the action of the clerk in any of these capacities. They further show that these latter duties should be so far annexed to the office as to pass to the successor in office, for the obvious reason that the suitors might look to the office, and not be compelled to follow the individual after his term has expired. In all of our cases subsequent to the Code, and cited above, it has been taken for granted that the successor in office, whether the clerk himself or a third person, and his sureties would be liable for moneys received from the predecessor. I was of opinion in the first of these cases, *Bowen* v. *Evans*, 1 Lea, 107, that the sureties of the clerk on his first bond, who is his own successor, would be liable for funds received as commissioner or receiver, until the court took some action to transfer the duty to the successor. But a majority of my brother judges thought that the liability of the successor would follow of course unless the default was shown to have been committed before the second appointment, the presumption being that the officer has done his duty. And the court has held that in order to render the sureties liable on the bond as special commissioner, it is not necessary that the clerk should be appointed or styled special commissioner. It is enough that the clerk was ordered to perform the duties, and that the duties were not those pertaining to the office of clerk proper. The law would refer the acts to the office whose duties require their performance: *Bowen* v. *Evans*,

1 Lea, 107; *Buford* v. *Cox*, 3 Lea, 518. And all the cases decided under the Code take for granted that the successor in office would receive funds from his predecessor in the character in which the predecessor held them. It must be so on principle, for otherwise he would have no authority to receive the funds at all. He takes necessarily as successor in function and office. And, as said in *Buford* v. *Cox*, where money or property comes to the hands of the incumbent, by virtue of his official position, otherwise than as commissioner or receiver, his sureties on his bond as clerk would be liable.

All of the funds in controversy were derived from sales of property, without any trust being attached to them by any order of court. They were therefore held by Cole as special commissioner. They fell within the condition of the bond given as special commissioner and receiver, and must be charged to the sureties accordingly.

One other exception of the sureties is to that part of the report of the Referees which finds that the decree below on the office bond, which was for the full penalty, should bear interest. But this court, upon the affirmance of a money decree in an equity cause, has always allowed interest thereon: *Trainer* v. *Skein*, 10 Yer., 369. And it is now so provided by statute, Code, sec. 3165. The interest is on the decree and not on the penalty. And it can make no difference which party appeals, the interest being an incident to the affirmance.

The complainant has excepted to the report of the

Referees that it gives a preference to the sureties under the assignment made by Cole of his fees. But the assignment is primarily for their indemnity, and the sureties are therefore entitled to the preference.

The exceptions to the report of the Referees will be disallowed, the chancellor's decree modified in accordance with the report and this opinion, and a decree entered accordingly, with the costs of the cause against the defendant.

FREEMAN, J., delivered the following dissenting opinion:

By Code, section 326, every clerk of the court, before entering upon the duties of his office shall enter into bond, with sufficient surety to the satisfaction of his court, in the sum of $10,000, payable to the State, and conditioned for the safe-keeping of the records, and for the faithful discharge of the duties of his office. This is imperative, as well as the bond required by the next section, as to taxes on suits, fines and forfeitures. Section 328 is not so, however, but is: "The several courts may also require their clerks to give bond, with surety, in such sum as the court may deem sufficient, to cover property or funds which may at any time come to the hands of such clerks, as special commissioners or receivers by appointment of the court or any judge thereof." Section 329: "The failure of any clerk to execute the special bond provided for in the last section shall not subject him to any penalty, but the court may confide the particular

business to such other person as will give the required security, and in the absence of such bond the clerk and his sureties will be liable on the regular official bond for all property and money, with which such clerk may be properly chargeable, as special commissioner or receiver." By section 330, the court is authorized "to require special bonds to meet particular exigences and in a suitable penalty, whenever in its judgment, the interest of suitors renders it necessary, subject to the provision of the last preceding section." That is, if no special bond is given, the liability shall be on ordinary official bond.

In this case considerable sums of money were received by Cole as clerk from the two former clerks, Alston and Stewart, which had been received by them as commissioners for sale of land, or as clerks, acting in this capacity. A larger sum was in his hands at his reappointment, received by himself from like sources during his previous term, and upwards of $6,000 was collected by him during his second term on sales made during former term. It may be assumed there was no default as to this during the former term, and it so remained in his hands until after his reappointment succeeding himself, and is the same so far as the question for decision is concerned, as if he has succeeded another and different party.

The question is, whether these funds thus coming to his hands, and not the result of sales made by him after the new term commenced, shall be chargeable on the general clerk's bond, or on the new bond given by him as special commissioner, required by section 328?

I think these funds are to be charged under the general official bond, and cannot be charged against the parties to the second, or special commissioner's bond. The fact that the office bond is only for $10,000, and the commissioner's bond for $30,000, I think has no bearing on the solution of this question. The court has ample power to protect suitors if deemed necessary, under section 330, as to all funds coming into his hands as these funds came. If such bond had been taken, that is a special one for moneys received from predecessors, then there could be no question the sureties on the commissioner's bond would not have been also liable on their bond. But it is expressly provided by the last clause of section 330, such a bond as is authorized, shall be "subject to the provison of the last preceding section." This evidently can only refer to the provision following the one providing that a failure to execute a commissioner's bond, shall not make a forfeiture of office, and the court may confide the particular business, that is sales, or either as commissioner or receiver, to any other person, who will give the bond, and then adds: "And in the absence of such special bond, the clerk and his sureties will be liable on the regular official bond for all property or money with which such clerk may be properly chargeable as special commissioner or receiver."

This means in case he shall act as such commissioner or receiver, and funds come to his hands, no special bond having been given, then he and sureties will be liable for such funds on general bond; so it follows in case of failure to exact a special bond, under

section 330 this provision comes into play, and the general bond covers it. I can see no other meaning or application to this clause, I think the same result would follow from our decisions, however, and this, only a declaration in plain terms, of what was the law.

I have carefully examined all our cases cited by my brother, Cooper, and while they do hold the payment of the funds in the hands of a predecessor into the hands of his successor, will discharge the sureties, and that if the funds are in the hands of the clerk, and he is his own successor, no default having occurred, the sureties for the second term are liable for such funds, still none of them have undertaken to fix this liability in cases of funds in his hands as commissioner, on the second commissioner's bond, in preference to the general official bond. In fact, I think the principle announced, and the theory on which the cases go, require a different holding. In none of the cases cited was this question made.

The old case of *Waters* v. *Carroll*, 9 Yer., 102, held that the sureties were liable for funds received by the clerk from a former receiver, he having himself been appointed receiver, and ordered to loan the money out. It was held to be in his hands as clerk, because he had done no act in obedience to the order, and had assumed no control over it as receiver. The theory of this holding is, that the duties of clerk and receiver are distinct, and farther, that where money is paid over by a receiver to a clerk, he receives and holds it as clerk, until he takes it under an order of court in a different capacity.

The case of *Williams* v. *Bowman*, 3 Head, 677, held that a clerk under a bond under act of 1849, conditioned "to well and faithfully account for and pay over all sums of money that shall come to his hands as special commissioner, etc., who collected the money after expiration of his term of office was responsible, with his sureties for the money." The theory of this opinion contravenes, as I think, definitely the view, that sureties on a second bond as commissioner, would be liable to the execution of the sureties on the general bond, if the money had been paid over to his successor. It is, that the special commissioner acts in any case, not as clerk but by virtue of his appointment to make the sale, as would be the case if he were to act as receiver of property or funds in court, or to be brought in. Judge McKinney says, page 582, as to the office of commissioner, "its duties do not appertain to the proper functions of the office of clerk. The duration of the appointment is not limited by law. This is left to the discretion of the court, according to the exigencies of the various cases that may arise." Again, page 583, as to whether or not handing the notes over to his successor would have discharged the commissioner, he says it was unnecessary to decide, as he did not do so, but he adds, "if he had done so, the court might doubtless have appointed his successor to have finished the execution of the trust." While nothing is decided on the question now under discussion, what is said goes definitely on the theory that the clerk is not special commissioner in any case, except where he is appointed as such,

or where he is appointed by the court to perform the duties of such a commissioner, without being in terms named such, as said by Judge Cooper in *Buford* v. *Cox*, 3 Lea, 523. It is enough that the clerk and master was ordered to perform the duties, and that the duties were not then pertaining to the office of clerk and master proper. "This would make him, as to these duties special commissioner or receiver."

Without going over the cases cited, *Bowen* v. *Evans*, 1 Lea, 107; *Smalling* v. *King*, 5 Lea, 585; *Yoakley* v. *King*, 10 Lea, 67, 73, it suffices for this argument, to say, while it is held that payment to successor, having the funds in hand without default, makes the sureties on clerk's bond liable for these funds, the question whether this liability shall be fixed on the sureties on second bond as commissioner, over the sureties on the general official bond, is not raised, discussed or decided. By Code, section 805, it is now provided in all cases where an office is vacated, "all books and papers, property and money belonging or appertaining to the office, shall be handed over to the qualified successor." I concede too, that if the successor receive it in the capacity of commissioner, than by virtue of section 771, *et seq.*, the bond would cover it. But the question is, does he receive this money as commissioner under the fair construction of the Code, or in accord with the whole theory of the question as found in our decisions? I think not, but that he receives the money *virtute officio*, by virtue of his official position, which is that of clerk. To this office is added, by our law, a bond to be given as such officer, to cover

all acts as special commissioner or receiver, that he may be ordered or called on to perform during his term of office. But an appointment by the court or an order to perform the function of commissioner or receiver, or the actual performance of these duties, is absolutely necessary to create the liability. In case no such order, or the receipt of the money is not while acting in such capacity under such an order, then it is received by him as clerk, and the liability is solely on his general bond, unless a special bond has been taken under section 330. This is in accord with all our cases, from the 9th Yerger case down to the present, and contravenes none of them.

The case of *Waters* v. *Carroll* presents the point clearly, for there the clerk received the money from a former receiver, and was by the court appointed receiver to loan out the fund. He failed to loan it, and his sureties as clerk were held liable because he did no act under the appointment as receiver. So in this case, he receives the money, or it may be property, as clerk by law, by virtue of his appointment or election to his office, and holds it in that capacity, until he is directed to do some act in the other capacity of commissioner or receiver, or does such an act, and then all such acts are covered by the commissioner's bond. The opposite conclusion can only be reached by holding that he becomes an official commissioner and receiver for the term of his office, by virtue of appointment as clerk or clerk and master; and this is rebutted by all the provisions cited. The language of section 328 is not impera-

tive that such a bond shall be taken, and in connection with section 329, leaves it clearly discretionary with the court whether it shall be done at all. That section provides for the appointment of any other party to perform these duties, thus indicating the bond is for acts to be performed in the future.

Suppose the clerk had given no special commissioner's bond, and the money had been paid over by Stewart and Alston to him, would he not have received it as clerk, and been liable on general bond? No one could doubt this. It is equally clear under section 805, as clerk he was entitled to demand and receive it, and as he could be clerk without a commissioner's bond at all, it follows that by law the one party was bound to pay, and the other entitled to receive as clerk. It might be he could not have received it as commissioner, because it may be, another may have been appointed to perform that function in that office.

This theory is further supported by the language of section 328, that the bond shall be taken "to cover property or funds which may at any time come to the hands of such clerk as special commissioner or receiver, *by appointment* of the court or any judge thereof. If the statute had stopped at the words "come to the hands of the clerk as special commissioner," etc., it might have served better to have supported the conclusion sought to be maintained, but when it is added "as special commissioner or receiver by *appointment* of the court, it is seen the liability does not attach by reason of his office only, but to

raise it there must be a special appointment by the court, in the sense of our decisions, and then all moneys or properties received under such special appointment, either as commissioner or receiver, are covered by the bond required.

In accord with this theory, it was held in the case of *Tanner* v. *Dancy*, 4 Heis., 483–1–5, that on failure to pay over funds in his hands to the successor, the former clerk was liable to judgment on motion, or even by the action of the court alone, the judgment to be in the name of the clerk and master. Judge Nicholson, in delivering the opinion, says, page 485: "The object of the proceeding is to have the funds which the former clerk and master was withholding from the office, paid into the office where they belonged. It was therefore proper to enter up judgment in the name of the clerk and master *who* was the rightful custodian of the funds." This was a case where the fund was in the hands of the former clerk as commissioner, it being proceeds of a sale of land ordered to be sold by the court.

For these reasons, I think, all funds not derived from sales, or from some act performed under appointment of the court, or in performance of duties of commissioners during the official term, are covered by the official bond, or may be covered by a special bond under section 330, but can never be held to be covered by the special commissioner's bond under the facts in this case. It may turn out a hardship in this particular case, but in general the bonds will be found sufficient—at any rate the law gives ample means

of securing all parties under section 330, and if more is required, it is for the Legislature to apply the remedy, not this court.

The principle of this opinion excludes the $7,000 and upwards item, the first in the account, where the money had been collected during the first term, with the other items received from Stewart and Alston.

It does not exclude the last item of upwards of $6,000, where the sales had been made before reappointment, but money collected afterwards. This act of collection of sale money is the act of a special commissioner, and may well be referred to that character, he collecting it necessarily either in such capacity, and probably under decrees of the court in most cases. It is like the case in 9th Yerger, where clerk was ordered to loan out the money as receiver. If he had done any act under that order he would have been responsible on his bond as receiver, and not as clerk: He could not in my judgment receive money from a former clerk or term except in his character of clerk. and this is either covered by his general bond, or may be by a special bond under section 330.

EUGENIE SAUTELLE *v.* LOUISA CARLISLE *et al.*

1. ESTOPPEL. *Married women and minors. Femes covert* and minors cannot be estopped by refusing to abide by a void agreement which none of them were competent to make, there being no fraud or deceit; mere acquiesence, under disability, cannot affect them.

2. STATUTE OF LIMITATION. *Remaindermen.* Seven years is required to complete the bar of the statute against remaindermen, after the termination of the life estate, even when the adverse occupant is claiming the fee pending the life estate.

3. VOID SALES. *Return of purchase money.* Purchase money received upon a void sale of land is treated as an equity attaching to the land, and a subsequent purchaser, with notice, takes it subject thereto.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W. W. MCDOWELL, Ch.

D. M. SCALES, W. M. RANDOLPH and SMITH & COLLIER for complainants.

C. F. VANCE, H. CRAFT, I. G. HARRIS and R. W. BETTS for defendants.

COOKE, Sp. J., delivered the opinion of the court.

Charles E. Rienhardt died testate in Shelby county, in 1847. He left surviving him a widow and eight children—seven daughters and a son, whose names were as follows, four of said daughters being then married, to-wit: Susan A. Wills (now Vaughn), Martha Horsely,

Harriet C. Wray, Mary A. Kerr and Margaret L., who afterwards married one Miller, Rebecca L., who afterwards married McMillan, and Eugenie L., who afterwards married one Sautelle. The last three then being minors.

By the first clause of his will he provided for the payment of his debts, etc. The second clause was as follows: "I give and bequeath all my real and personal property of which I am possessed, to my wife, except as hereinafter specified, so long as she lives." He then, by subsequent clauses, gave to two of his daughters, Mrs. Wills and Mrs. Horsely, eight hundred dollars each, which he states they had received. He gave to Mrs. Wray a negro girl, by name, valued at $400. To Mrs. Kerr he gave a farm on Wolf river, she to pay to his estate $400. And to his son, James O. Rienhardt, his medical books, drugs and medicines, and a horse, saddle and bridle. And then by the eighth clause provided as follows: "It is my wish that my daughters who are single remain with my wife, and should they marry, that my wife assist them at discretion, keeping an account of the same; and that after her death, my daughter, Harriet C. Wray, be made equal to Susan A. Wills and Martha A. Horsely and Mary A. Kerr, that is, to the amount of $800 with what she has received; and that my daughters, Margaret L., Rebecca L. and Eugenie L. Rienhardt, be made equal also in the said amount of $800. After which an equal distribution be made amongst my daughters of the balance, except $200 to James O. Rienhardt."

He appointed his wife executrix of his will, who soon after his death proved the same and qualified as such. The debts of the estate seem to have all been paid. The widow died in August, 1870, and at her death there remained of the property of which the testator died siezed and possessed, a lot or parcel of ground containing about two acres, in the city of Memphis, extending, of a specified width, from Poplar to Adams street.

The original bills in these causes were filed to have a construction of the will and the estate administered and distributed according to its provisions, so far as the same had not been done. The chancellor was of opinion, and so decreed, that the widow took a life estate in the property, under the will, and the daughters each an equal, transmissible interest in remainder, subject to the specific legacies charged upon it. The Referees have so reported, and we think correctly, and that the authorities which they cite fully sustain this branch of their report.

Soon after the death of the testator and qualification of the executrix, by an agreement between her and all the daughters, except Mrs. Miller and Wray and wife, Wray agreed to take a certain specified portion of said lot, fronting on Adams street, in lieu of the legacy of $400 which Mrs. Wray was to receive at the death of the widow. This part of the lot was unimproved, had been a brick-yard, and was in holes and ponds of water, required a considerable expenditure to prepare it for improvement, and was worth at the time about $400. In pursuance of this

agreement, Wray and wife took possession of that portion of the lot, enclosed it with a fence, and about 1850 built a residence and other improvements upon it, and have continuously held and occupied it and claimed it adversely to the other devisees and all others to the present time. At the time of this agreement all of these daughters who were entitled in remainder, after the termination of the life estate of the widow, were either *femes covert* or minors. There was an attempt to reduce this agreement to writing, and a paper containing it was drawn up and signed by the widow, and most, if not all of the daughters, except one (Mrs. Miller), but was never either acknowledged or delivered, and has been lost. In 1854, the widow, as well as these daughters, became dissatisfied with the arrangements and refused to perfect or deliver the writing, and the widow instituted an action of ejectment against Wray to recover possession of the property, but in which she was unsuccessful.

In 1862, the widow sold and conveyed her life estate in the property to Mrs. Carlisle, who took possession of the family residence, fronting on Poplar street, and has held and occupied it ever since.

In 1862 or 1863, three of the daughters, Mrs. Wills (now Mrs. Vaughn), Mrs. Horsely and Mrs. McMillan, also conveyed their remainder interests to Mrs. Carlisle, and there is no controversy now as to her right to these interests. Mrs. Kerr, in 1863 conveyed jointly with her husband, her interest to Mrs. Carlisle, but her privy acknowledgment of the deed was defective, and the deed was therefore void. She repudiated the deed and

has since died, and her heirs now claim her interest in the estate. Mrs. Miller, also in 1863, conveyed her interest jointly with her husband, to Mrs. Carlisle, but her privy acknowledgment was defective, and the deed therefore void. In 1866, she jointly with her husband, sold and conveyed the same interest to Wray, who has subsequently conveyed it to his wife. This last conveyance of Mrs. Miller and husband to Wray, was properly acknowledged and duly registered. The consideration paid by Mrs. Carlisle for these interests was about $3,000 of Confederate money for each, and she has filed a cross-bill alleging that these conveyances to her were void for want of sufficient privy acknowledgment, and seeking to have the purchase money paid by her for the same refunded, and a lien upon these interests for the same declared and enforced.

Mrs. Miller, who has been made a respondent in all the cases, has failed to answer, and does not set up or claim any interest in the lands or estate of the testator, or seek any relief in any manner whatever. Mrs. Eugenie Sautelle died never having in any manner attempted to dispose of her interest in the estate, her heir is before the court and claims her one-seventh reversionary interest and legacy of $800 under the will, and which is not contested, under the construction we have given to the will, except as to that portion of the lot claimed by Wray and wife.

It is very earnestly insisted by Wray and wife that all of the daughters of the testator, except Mrs. Miller, who has conveyed her entire interest to him as above stated, are bound by said verbal contract

and attempted writing, as a family arrangement and settlement, and are estopped by reason thereof and their acquiescence, and permitting Wray to possess and improve the same without objection; and are also bound by the statute of limitations.

The chancellor held that neither of these positions was tenable, and that they, or their heirs or assigns, are still entitled to their respective interests in the entire property. The Referees, however, have reported upon this branch of the case, that they are estopped, by reason of the facts and circumstances above stated, from now setting up any claim to that portion of the lot so held and claimed by Wray and wife, and that their right to the same has been thus perfected. We are not able to concur in this part of the report. That there was a parol agreement that Wray and wife were to have this part of the lot, in lieu of Mrs. Wray's $400 legacy, and which was concurred in by all of them, except Mrs. Miller, who was absent and urged upon Wray, and which agreement was reduced to writing, and was signed by the widow and most of the daughters, but never acknowledged or delivered, as before stated, we think is perfectly clear. But that it was not binding upon any of these daughters, even if it had been delivered, for the reason that they were all either married women or minors, is equally clear. As to the widow, Wray and wife have had the benefit of it during the continuance of her life estate. The state of the title to the property, the condition of the parties, and of the property, was equally as well, if not better, known to

Wray, as it was to any of the other parties. There is not, in fact, any pretence that there was actual fraud or deception on the part of any of them, or that Wray was deceived in any manner whatever. And the only real grounds of estoppel urged is the fact that they refused to abide by a void agreement which none of them were competent to make and that well known to Wray at the time.

That *femes covert* and minors cannot be estopped in such a case, except for fraud or deceit, is perfectly well settled, and it is difficult to see how the fact that they availed themselves of a long established and well understood provision of law, made for their protection, could be held to be fraudulent. And their mere acquiescence under disability could not affect them.

There can be no bar of the statute of limitations, for the reason that the life estate fell in August 11, 1870, and the bills in these causes were filed in 1874, and it is worthy of remark that in the one filed by Wray and wife they do not set up any claim to exclusive ownership of this part of the property. That seven years is required to complete the bar of the statute against remainder-men, after the termination of the life estate, even where the adverse occupant is claiming the fee pending the life estate is also well settled. The chancellor's decree upon this branch of the case was therefore correct, and the exceptions to this part of the report of the Referees must be sustained. The heirs of Mrs. Kerr, having elected to repudiate her deed and claim her interest in the

estate, must stand in her shoes and be required to refund the considerations which she secured for it, and which will constitute a lien upon said interest.

This has been so held, both by the chancellor and the Referees, and in which we concur.

As to the claim of Mrs. Carlisle, to have the purchase money paid by her to Mrs. Miller, declared a lien upon the interest which she owned at the time, now in the hands of Wray and wife, her subsequent vendees, presents a different question and about which we have had some doubt. The principle upon which married women have been required, under our decisions to refund the purchase money which they have received, before they will be relieved against the consequences of void conveyances executed by them, seems to have been generally, if not always, that they were asking some active aid or interposition of the court. And as it would be inequitable that they should be restored to the possession with which they have parted without restoring the consideration therefor received by them, they are required to do equity before they are entitled to relief. But conveyances executed by married women although joined in the same by their husbands, without a sufficient privy acknowledgement, as required by the statute, are absolutely void as to them, and that being the case it is difficult to see why any other person may not purchase from them just the same as though the former conveyance had never been executed. Yet purchase money received as consideration upon a void sale of land has been treated as an equity attaching to the land, and

to which a subsequent purchaser with notice takes it subject, and in order to avoid which, it was held in the same case, a plea of innocent purchases for value without notice of the equity must be formally pleaded or relied upon by answer: *Rhea* v. *Allison*, 3 Head, 176.

In this case no such defense is attempted; but Wray admits in his deposition that he did know of the purchase by Mrs. Carlisle of Mrs. Miller's interest before he purchased it himself. In accordance with this ruling we hold that Wray did take the interest of Mrs. Miller subject to Mrs. Carlisle's equity to have her purchase money restored and his conveyance to his wife being merely voluntary she stands in no better condition. This interest, therefore, is subject to a lien in favor of Mrs. Carlisle for the value of the purchase price paid by her to Mrs. Miller for the same. This was so held by the chancellor, and in which the Referees have concurred.

The chancellor decreed that the administrator of one Kortrecht had a lien for $263 bid by him at a sheriff's sale in 1874 upon the interests of Mrs. Vaughn and Mrs. Miller. The record shows they had both sold their interests and the conveyances duly registered before the levy, and the Referees have reported that this portion of the chancellor's decree was erroneous and should be reversed, and that Kortrecht's estate is not entitled to anything. And there is no exception to this part of the report, and which will be in this respect confirmed. The report of the Referees except as to the interest of Mrs. Wray in a

lot on Adams street, will be confirmed and the chancellor's decree will be modified so as to disallow the item of $263 decreed in favor of Kortrecht, administrator, and in all other respects will be affirmed and the cause remanded to the chancery court to be proceeded in according to said decree with this modification above specified.

The costs of this court will be paid equally by Mrs. Carlisle and Wray and wife, they having alone appealed, and the costs of the chancery court as decreed by the chancellor.

THE STATE *v.* BUTLER *et al.*

1. CONTRACTS, LEGISLATIVE. *Taxes.* Under the Constitution of 1834, the Legislature had power to grant to incorporations created by it, either partial or total immunity from taxation for any length of time it deemed proper.

2. CORPORATIONS. *May exercise new powers. When.* The State may authorize a corporation to alter its original enterprise and exercise new franchises to any extent without impairing any contract with the corporators. The effect of such a law is merely permissive, and takes away no existing power and affects no existing right.

3. SAME. *Special provision as to taxation of.* The provision in an act of incorporation that the company "shall pay to the State an annual tax of one-half of one per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes" is valid, and relieves the corporation from all other taxes, State or municipal. Under this provision its real estate necessary for the transaction of its business, is not subject to taxation.

4. SAME. *Charters inviolable.* Neither the Legislature nor a Constitutional Convention has the power to violate the contract between the State and a corporation contained in the charter of the latter.

FROM SHELBY.

Appeal from the Chancery Court at Memphis. W. W. McDOWELL, Ch.

MINOR MERRIWETHER, W. M. RANDOLPH and ATTORNEY-GENERAL LEA for complainant.

FRAYSER & SCRUGGS and TAYLOR & CARROLL for defendants.

COOKE, Sp. J., delivered the opinion of the court.

By an act of the Legislature passed March 20, 1858, the DeSoto Insurance and Trust Company was incorporated with power to conduct a fire and life insurance business, the capital stock not to exceed $300,000.

By the tenth section of said act of incorporation it was provided, "that said company shall pay to the State an annual tax of one-half of one per cent on each share of the capital stock subscribed, which shall be in lieu of all other taxes." By a subsequent act of the Legislature passed February 12, 1869, the president and directors of said company were empowered, upon being authorized by a vote of the stockholders, to discontinue the business of insurance and adopt that of banking, under the name and style of the Union and Planters' Bank of Memphis, with privilege of increasing the capital stock to a sum not exceeding $1,000,000, retaining "all their present rights, privileges

and immunities, excepting only that of insurance." The stockholders authorized the change, the capital stock was increased to $600,000, a banking institution was organized under the style of the Union and Planters' Bank of Memphis, and has continued to conduct a general banking business ever since. It provided itself with a banking house in Memphis necessary for the conduct of its business, which was paid for out of its capital stock and which it occupies and uses exclusively as its banking house and place of business.

The DeSoto Insurance and Trust Company and the Union and Planters' Bank of Memphis have regularly paid the one-half of one per cent upon each share of the capital stock subscribed as required by section ten of said act of 1858. The capital stock subscribed to the Union and Planters' Bank is now worth one dollar and forty cents on the dollar. The municipality of Memphis assessed said banking house for taxes for the years 1874, 1875, 1876, 1877 and 1878, at the same rate and in the same manner that other real estate in the city was assessed, and which is standing uncollected upon the tax books of the extinct municipality of Memphis, in the hands of Minor Merriwether, back-tax collector and receiver of said municipality, who is seeking to collect the same. The above agreed state of facts was submitted to the chancellor for adjudication as to the validity of said assessment, and the liability of said bank to pay said taxes. Said Union and Planters' Bank insists, that by virtue of said tenth section of said act of 1858, and their payment of one-half of one per cent upon each share of its capital

stock subscribed, said banking house, etc., are exempt from said municipal taxes.

For the State it is insisted that said tenth section is in contravention of the Constitution of 1834, which was in force at the dates both of the passage of said acts of 1858 and of 1869, and the organization of said bank thereunder, and also of the Constitution of 1870 and of the bill of rights, and that said tenth section, so far as it attempts to restrict the power of subsequent Legislatures to tax the property of said bank was a nullity, and if the immunity existed under the act of 1858, it was not transferred or continued by the act of 1869, and does not exist in favor of said Union and Planters' Bank.

The chancellor determined the questions submitted in favor of the bank, and the State has appealed.

The main questions submitted and relied upon in behalf of the State have been so often adjudicated and determined both by this court and the Supreme Court of the United States as not to require any further discussion or attempt at elucidation, and the cases are too familiar to require citation. That charters of incorporation are contracts between the State and corporation, the obligation of which cannot be impaired; and that the Legislature had power under the Constitution of 1834 to grant to incorporations created by it either partial or total immunity from taxation for any length of time it deemed proper, has been held by the uniform current of decisions of this court and also of the Supreme Court of the United States, and while this latter power has been se-

riously questioned and dissented from by some of the most eminent jurists. And while it may be conceded that if it were a new question it might well be determined against the power, we concur in the opinion so often announced, that it has been too long settled now to be disturbed. Its practical importance in this State has been greatly lessened by the adoption of the Constitution of 1870. Hence we dismiss this branch of the case without further comment.

It is insisted, however, that if it is granted that the immunity existed under the original act, it only belonged to the corporation as an insurance company, and was not continued to it as a banking corporation under the act of 1869, which was amendatory of the original act. The only changes of the original charter made or authorized by the act of 1869 was the privilege of changing the business of the company from that of insurance to that of banking, to change its name and authorize the increase of its capital stock, expressly retaining "all their present rights, privileges and immunities, excepting only that of insurance." This was not to abolish the original incorporation, or to grant a new charter, or to in any manner restrict the rights or powers originally possessed by it, except as to the business of insurance. "It is evident," says Mr. Morawitz, "that a State may authorize a corporation to alter its original enterprise and exercise new franchises to any extent without impairing any contract with the corporators or between the corporators. The effect of such a law is merely permissive; it enables the corporation

to exercise new powers without breach of the law, but it takes away no existing power, and effects no existing right": Mor. on Priv. Cor., sec. 455; see also 92 U. S. 665. But if this were not so—the statute by which these changes were authorized expressly reserved to the company as before stated, "all their present rights, privileges and immunities excepting only that of insurance." The principal if not the only immunity possessed by the company was the right to pay one-half of one per cent per annum upon the capital stock subscribed in lieu of all other taxes, and to have immunity from any other or further taxation upon complying with this provision of the charter. And that this immunity was continued to the company in its new business by the express terms of the 21st section of the act of 1869, also, is too well settled to admit of any doubt: *Railroad Co.* v. *Hicks*, 9 Baxt., 442; *Wilson* v. *Gaines*, *Ib.*, 546; *Gaines* v. *Whitworth*, 8 Lea, 594. And it has been so in effect determined both by this court and the Supreme Court of the United States in regard to the indentical charter now under consideration. In the case of *Memphis* v. *Farrington*, 8 Baxt., 539, Farrington was the owner of a number of shares of stock in this identical Union and Planters' Bank, upon which the State assessed taxes, the payment of which was resisted upon the grounds that the shares of stock were exempt under the above cited provisions of the charter.

In the opinion of this court, delivered in that case, it was conceded that under the provisions of the charter the payment of one-half of one per cent had the

effect to relieve or exempt the capital stock of the bank from the payment of any other taxes. But it was held that as there was a distinction between the capital stock of the bank and the shares of stock owned and held by individuals, it was not the purpose of the Legislature to exempt both, and hence the individual shares of stock owned by Farrington were subject to taxation. The cause was taken by appeal to the Supreme Court of the United States, where it was held that the charter was a contract between the State and the bank, and the tax of one-half of one per cent on each share of the capital stock was in lieu of all other taxes, and hence the shares of said capital stock were not subject to any additional tax in the hands of the holder. Hence the judgment of this court was reversed with directions to enter a decree in favor of the stockholders: 95 U. S., 679. While we are aware of the rule that where there is any doubt as to the power to assess the tax, the doubt must be resolved in favor of the power, yet conceding the rule to its fullest extent, standing as this case does, we can not see where there has been any room left for a possible doubt by the direct decisions upon the very questions involved.

That the banking house necessary for and actually used in the conduct of the business of the company is covered by the exemptions: See *DeSoto Bank* v. *Memphis*, 6 Baxt., 415; *Bank of Commerce* v. *McGowan*, 6 Lea, 703.

It is, however, insisted now that inasmuch as the

capital stock of the company was restricted by the original charter to $300,000, and by the amendatory act was allowed to be increased not to exceed $1,000,000, and was actually increased to $600,000, and as it was their *present* rights, privileges and immunities which were retained, although whatever the immunities the company then had are still possessed by the defendant bank. Yet it is only applicable to the amount of capital stock it then had, and can not extend to the increased capital stock of the company. We are unable to yield assent to this proposition. In the cases above referred to in which this same charter has been construed no such question was raised or insisted upon, but the immunities of the charter exempting the company from any further or other taxation except one-half of one per cent upon each share of its capital stock subscribed, was taken and held to apply to the entire capital stock then subscribed (and which was stated to be $675,000), as well that which was subscribed after as before said amendment of 1869. No question was made as to whether the shares of stock owned by Farrington were subscribed before or after said amendment to the charter, or whether they were of the original or increased capital stock of said corporation.

Again it will be observed that the provision of the original charter was not to pay one-half of one per cent upon $300,000 of capital stock, but while as the charter then was the capital stock was not permitted to exceed that sum, yet the provision was to pay one-half of one per cent upon each share of the capital

stock subscribed, which was to be in lieu of all other taxes, etc. The amendment simply granted the company the privilege of increasing the capital stock to a sum not exceeding $1,000,000, but the charter immunity of paying one half of one per cent upon each share subscribed in lieu of all other taxes, was in no manner whatever attempted to be changed or interfered with. They could have increased it to any amount less or greater than they did not to exceed $1,000,000, or permitted it to have remained as it was, and the obligation to pay simply attached when the shares were subscribed, and upon the amount subscribed. That the rights vested under the charter in question could not be affected by the Constitution of 1870 is perfectly plain. As we have seen, it was a contract between the State and the bank, and a convention of a State has no more power than a Legislature to violate the obligation of contracts: 9 Yer, 495; 1 Heis., 284; 4 Wallace, 595.

Other questions have been raised in argument which we deem it unnecessary to notice, as they are all resolved under the principles already announced. The result is that the chancellor's decree must be affirmed. The parties each will pay one-half the costs.

FREEMAN, J., delivered the following dissenting opinion:

By the act of March 20, 1858, certain parties were incorporated under the name and style of the "DeSoto Insurance Coorpany," with power to conduct a fire and life insurance business.

By the 10th section of the act it was provided that "said company shall pay to the *State* an annual tax of one-half of one per cent on each share of capital subscribed, which shall be in lieu of all other taxes.

By the act of February 12, 1869, this company were empowered to discontinue the business of insurance, and adopt that of banking, under the name of Union and Planters' Bank of Memphis, under which the present banking institution was organized. The exemption contained in the tenth section of the charter of the insurance company may be assumed at present for the purposes of this opinion to have been conferred on the bank in the charter granted. The bank is owner of a valuable banking house in the city of Memphis, purchased with its capital stock, used exclusively for the business of the bank.

This property has been assessed for the years 1874 to 1878, inclusive for taxes by the late municipality, the city of Memphis, the property being valued variously for the several years ranging from $27,000 in 1874 to $17,000 in 1878, and the taxes claimed to be due, amounting to several thousand dollars.

The bank having paid the one-half of one per cent to the Comptroller of the State Treasury, claims to be exempt from all other taxes. The rate of taxes for these years on the property of other citizens ranged from $1.80 on the hundred dollars to $3, and is said in subsequent years in the city to have been still heavier.

The question is whether this exemption can be

made good under the above cited tenth section of the charter of incorporation. I do not think proper to go into a review of the cases on this question in our own and the Federal courts. They are so familiar to the profession as not to require citation. It is sufficient to say, that it may be considered as settled by the Supreme Court of the United States, that wherever the Constitution of the particular State does not forbid the Legislature from granting such an exemption that it creates a contract in all its essential features, which is protected by the clause of the Constitution forbidding a State from passing any law impairing the obligation of contracts. The protection of this clause, the writer thinks, has been carried to an extreme limit beyond what is justified by sound principles of constitutional exposition. But with this as a judge of a State court at present I have nothing to say. We are called on, however, to say whether our own State Constitution authorizes, or did authorize our own State Legislature to make such a contract as this is contended to be. I think this court is the sole exponent of the constitutional powers of the Legislature of the State under the Constitution. This is in accord with the theory of our American system, both State and Federal, and may properly be denominated its most definitely marked peculiarity, distinguishing it from that of all other systems of government. To yield this, and concede that the courts of the United States, to us in most senses foreign tribunals, should be the exponent of the powers of our State government, is to concede

away the independence of our State government within its well defined sphere of operation, its own territory, for the powers of government confided to the departments of the State government would be only what such foreign courts might hold them to be, and thus our State government practically be dominated by a power from without. Under such a view instead of a free and independent State, we should be a subordinate agency, subjected to the limitations that may be imposed by the views of a tribunal organized and exercising its powers under a different government, it might be with no sympathy with our own system, certainly with no responsibility to our own people.

It suffices to say, that I do not understand the Supreme Court of the United States to have even held (no exceptional element being in the case), that it would disregard the opinions and decisions of the Supreme Court of the State, as to the constitutional powers of its own government, on the contrary the principle has always been, at least in theory if not in fact, conceded that such decisions are conclusive and binding on that court. The case of *Talcott* v. *Township of Pine Grove*, 19 Wall, 666, going further, but that recognizes the general principle but avoids it on the idea of the bonds being negotiable, and the question therefore one of general commercial law. Believing these general views to be correct, and the principles stated sound, I proceed to the examination of the question presented.

The clauses of the Constitution of 1834, under which

the act of 1869 was passed, bearing directly on the question of taxation are as follows, Section 28, Article 11: "All lands liable to taxation, held by deed, grant or entry, town lots, bank stock and such other property as the Legislature may from time to time deem expedient, shall be taxable; all property shall be taxed according to its value, that value to be ascertained n such manner as the Legislature shall direct, so that the same shall be equal and uniform throughout the State, no one species of property from which a tax may be collected, shall be taxed higher than any other species of property of equal value."

Section 29: "The General Assembly shall have power to authorize the several counties and incorporated towns in this State to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation."

I remark first, that this case does not present any question on the power of the State under this Constitution to pass by property and not tax it at all; on the contrary it is a case where the State has taxed it, but in a peculiar way, that is by contract, and at a fixed sum, and that for the life of the corporation. In this view the first question is, not so much whether the State might not exempt altogether, but whether the Legislature has the power to tax at all by contract at an agreed sum? If such a contract for taxation be void, beyond the power of the State to make, then the essential element of a contract, the consideration

fails, and the exemption would have nothing to support it. By all the decisions of the Federal Supreme Court, a consideration is held necessary in order to uphold such a contract. In addition, if the consideration of the contract is shown on its face as in this case, and that fails, then the exemption based on it would fail, as it is clear the Legislature based the exemption on the consideration that it had a valid contract with the bank to pay one-half of one per cent on stock subscribed, without this, beyond question the exemption would not have been granted. If this contract is beyond the constitutional power of the Legislature, then the sole ground on which the exemption clause, as only one term of the contract, must fail with this.

That the article of the Constitution cited by necessary implication forbids taxation by such a contract, or by any contract, seems too clear for argument or question. The rule is that all property shall be taxed at its value, that value to be ascertained in such manner as the Legislature shall direct, so that the same shall be equal and uniform throughout the State. To say that an arbitrary agreed tax on the capital stock, of one-half of one per cent, when it is found in the form of a house and lot, is a tax according to this requirement is what we take it, no one would maintain. In fact the thing done is not intended to be a compliance with the constitutional requirement at all, but is in the nature of a composition of the irregular and uncertain burden of taxation by an agreement, that so far as this property is concerned, it shall only pay the

fixed sum agreed on, be the exigencies of government what they may, and the tax levied on other like property in the State what it may.

We have it stated in brief of counsel that there are nine other banking and insurance corporations in the city with capital of $1,682,000, with no such exemptions, that are compelled to pay taxes at a rate ranging from $3.45 on each hundred dollars, to even as high in one year, 1870, as $5 on the hundred, while this corporation and others with like exemptions only pay one-half of one per cent per hundred dollars. That this is a gross violation of the principle of uniformity and equality in public burdens no one would deny. This is the imperative rule of the Constitution as to all property taxed, and how it could be held that such a contract was consistent with or permissible under such a Constitution, I have never been able to see.

It is true all property is not absolutely required to be taxed, as under the Constitution of 1870, with certain exceptions, but when taxed it is imperatively required to be taxed on the principle of uniformity and equality. That this property is taxed is conceded, and proof given of the fact of payment of this tax. That it is not taxed according to the requirement of the Constitution, but in contravention of it, is beyond question. That this tax in contravention of and forbidden by the Constitution is the basis on which the exemption rests is certain, and without which it would not have been granted, is equally certain. The contract for the consideration being void, the resultant contract must fail.

The result would be, that the Legislature has no power to make the precise contract made, or in fact to make any contract with any one, either corporation or individual, that it or he shall be taxed only at a specified and arbitrary rate, regardless of the value of the property taxed at the time such tax is laid or assessed.

No one denies that the rule of the Constitution is uniformity and equality as to all property taxed, and that this rule is based on the principles of justice and fairness to all the citizens of the State. The principle underlying it is, that taxes are a compensation for the protection given by government both to person and property, therefore the latter should pay in proportion to the value of the property protected. The rule given in the Constitution is not only violated, but the very principle on which the rule rests subverted by the exemption claimed in this case. It is said, and we take it to be true the market value of the stock in this particular bank $140 per share of $100, showing that there is no proportion between the value of the property protected and the burden imposed, as compared with burdens imposed on other property of the State, in this case, and aptly illustrating the violation of the rule of uniformity as required by our Constitution. That this is a direct violation of the Constitution, I cannot doubt. The principle is axiomatic, one that needs no argument or authority to sustain it, that the affirmative prescriptions of the Constitution forbid the opposite of what is therein prescribed. The rule is thus stated by

Judge Catron in *Norment* v. *Smith*, 5 Yer., 272: "Whenever a State Constitution prescribes a particular manner in which power shall be executed, it prohibits every other mode of executing such power. On that particular subject, the authority is exhausted by the constitutional provision, and an attempt to render it nugatory by law, would be an attempt at repeal": *Lynn* v. *Polk*, 8 Lea, 160; *People* v. *Draper*, 15 N. Y., 543. With this principle before us, the only question is whether the Constitution shall prevail or the act of the Legislature? a question to which there is but one answer.

The principle of the rule of uniformity and equality cannot be better stated than we find it in Burroughs on Tax., sec. 51: "The general idea conveyed by these provisions is, that taxes shall be assessed according to some ratio or rule of apportionment, so that A shall pay upon a piece of property of a certain value, the same amount as B upon a similar piece of property of equal value. To compel individuals to contribute money or property for public use without reference to any common ratio, and without requiring the sum paid by one piece of property, or by one person, to bear any relation whatever to that paid by another, would be forced contribution, not a tax, within the sense of that term as applied to the exercise of power by an enlightened government."

It is true this principle comes mainly into play where a tax is directly imposed on particular property in violation of the rule, but equally reaches to this case, because what this party is exempted from

paying is to be borne by others less favored, and their burdens thereby increased, and thus the inequality works its evil consequence on all. It suffices, however, that it plainly is in the face of the Constitution of the State, and therefore the contract one beyond the power of the Legislature to make. This being so, I am compelled as a judge of this court, expounding the Constitution of my own State, to hold the exemption claimed void. If these views should prevail here the question can again be brought for review before the Supreme Court of the United States. That high tribunal has never held doctrines contravening the principle I have maintained except by a divided court. It is a question involving so much of vital interest to the people of this country, and becoming every day of more vital concern, that it can hardly be considered as settled or closed by judicial decisions against it. I deem it my duty to make an effort to have the question again reviewed by that court before I, as a State judge, can yield to what has already been done and said on this question. While I concede many of the cases in that court are based on a theory contrary to what I deem sound in this question, yet in other directions that court has followed lines of thought, and embodied them in their later decisions, that seem to me logically to involve a modification of their former holdings on the question now under consideration.

I hold with Judge Miller, and the other dissenting judges, in familiar cases, that the Legislature has no power to bargain away the vital power of taxa-

tion without which no government can exist. That this is a question of power, and not the extent to which it may be exercised, and that if the power exists to exempt one species of property from taxation, or to grant such exemption to one class, then the same may be done as to every species, or to any number of individuals or corporations, and thus our Legislature may destroy the life of the State. Whenever you concede the power, there is no limit to its exercise. It goes then outside the sphere of judicial action, and falls within the sphere of the Legislature, and at once becomes an unlimited power, with no restraint whatever upon the extent of its exercise.

The principle on which the case of *Stone* v. *Mississippi* rests (101 U. S., 814 to 820), as given in note to Cooley Const. Lim., opinion of Chief Justice Waite, if carried to its logical result, or applied to the facts of the present case, is conclusive in favor of the proposition for which I contend. It is "the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people in their sovereign capacity have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority while in power, but they cannot *give away* nor sell the discretion of those that come after them in respect to matters the government of which, from the very nature of things, must vary with varying circumstances."

I am aware that this was said with reference to that undefined region of our law known as the "police power," but it is applicable with far more force to a contract giving away or selling the power of taxation. This is a power without which the police power ceases to be of use, for the latter can only be exercised through the official agencies of the government, and these depend for their continued existence on the untrammeled exercise of the taxing power. If the taxing power is "sold or given away," then the other power that cannot be sold or given away becomes lifeless, so that in fact to "sell or give away" the taxing power is practically to destroy the other, which is now declared to be beyond the sphere of contract. If you cannot sell or bargain away the police power, it follows, inevitably, you cannot sell or give away that on which it depends for its continued life. This would be to hold you could not give away or sell directly, but the same thing thus forbidden could be effectually done by only going back one step and selling that on which the police power depended, and this would be legitimate. Besides, the taxing power is one needing above all others to be free, because it is one by its very nature that must be exercised on ever varying circumstances of need by the State. This is peculiarly so in this country, where the value of property is subject to more fluctuation than in any other country of the world by reason of the speculative spirit of our people, born largely of the advantages of soil and climate, with other favorable conditions enjoyed by them, not the

least of which are the freedom guaranteed by their written constitutions, protected from infringement by what should ever be the watchful vigilance of an enlightened and independent judiciary. We need but point to the fact that in one year the property of this State, from September 1873 to 1874, probably shrank in value a hundred millions—certainly within two years such was the fact. If half or one-third of that property had been protected from the burdens thus falling on this lower value with the demands of government grown large by the previous years of prosperity, all can see how oppressively it would operate on the masses having no such exemptions. If the principle contended for be carried to its logical result such a state of things might well have existed. In fact, if we could get a full cash estimate of all the property in banking, insurance and railroad corporations exempt at that period, it would probably not have fallen far short, if any, of one-third the taxable property of the State.

But the principle that a power to be exercised under varying circumstances necessary to the continued existence, and not simply the well-being of the State, can never be given or bargained away, absolutely forbids the construction of our organic law that will permit such a contract to stand.

I do not deem it necessary in this opinion to review our own cases on this question. The first case *Bank* v. *The State,* 9 Yer., was under a law passed before the Constitution of 1834. In all the other cases it will be found that the principle herein com-

batted was either assumed, but not necessarily decided, and if acquiesced in, was done under protest, on the assumption that the decisions of the Supreme Court of the United States compelled it, or else involved the element of an exemption of a railroad company in which another clause of the Constitution came into play, towit: sec. 10 of Art. 11, authorizing the Legislature to encourage a well regulated system of internal improvements. It would appear that at least one way to encourage would be to relieve from taxation for a reasonable period, or it may be plausibly argued, if the Legislature could aid or encourage by direct grants of State aid, as it has done, these grants to be met by taxes, then it could as well do so by allowing them to retain the taxes which they otherwise would have to pay. On this ground I have acquiesced reluctantly in admitting such exemptions in favor of railroad corporations.

I need but to say this exemption cannot be sustained under the power "to grant such charters of incorporation as they may deem expedient for the public good," as this can never be held to authorize the making of a contract with such a corporation in violation of other clauses of the Constitution, as we held in the *Overton Hotel* case, 12 Heis. R.

This argument might be indefinitely enlarged, but I deem this sufficient to present the basis of my objection to the exemption claimed. In view of the fact that the present Supreme Court of the United States is composed, a majority of them, of men who have not been called on as yet to meet this direct

question, where the exemption is in favor of a trading, moneyed corporation alone, and the later views of that court, in such cases as *Stone* v. *Mississippi*, I feel it a duty I owe to my own State and her people, to make an earnest effort to again have the question passed on by that high tribunal.

For these reasons, and others that might be given, I am compelled to dissent from the ruling of the majority.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

EASTERN DIVISION,

KNOXVILLE, ... SEPTEMBER TERM, 1884.

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY *v.* A. HANDMAN, Administrator.

1. EMPLOYER AND EMPLOYE. *Fellow-servants.* An employe, as between himself and his employer, undertakes to run all the ordinary risks of the service, and this includes the risk of injuries from the negligence of his fellow-servants.

2. SAME. *Same.* The rule applies where the injury results from the negligence of another employe who is the immediate superior of the injured employe, unless the superior servant so far stand in the place of the master as to be charged, in the particular matter, with the performance of a duty to the inferior which, under the law, the master owes to the inferior, or unless the injury is occasioned by the direct order of the superior in a sudden exigency.

3. SAME. *Same. Railroads.* Where a fireman on a railroad locomotive was killed by the explosion of the boiler while the engine was standing on the track ready to start with a train of cars, and the engineer failed to come thirty minutes before the time of starting as required by a rule of the company, it was error to charge the jury that if the proof satisfied them that the engineer had failed to comply with the rule, and were further satisfied that his delay was the proximate cause of the accident, then the plaintiff would be entitled to recover.

4. SAME. *Same. Damages.* In an action by an employe against the employer to recover damages for the negligence of the employer in not having, or keeping in repair the boiler of an engine, if the trial judge charge the jury in relation to the knowledge of the employer of the defect, he should in the same connection state the effect of the knowledge of the employe of the same defect; for ordinarily if the knowledge or ignorance of the master and servant in respect to the character of the machine are equal, so that both are without fault or in equal fault, the servant cannot recover.

FROM HAMILTON.

Appeal in error from the Circuit Court of Hamilton county. D. C. TREWHITT J.

KEY, RICHMOND & CLARK for Railroad.

J. W. CLIFT and J. A. MINNIS for Handman.

COOPER, J., delivered the opinion of the court.

Action by Handman, as administrator of Charles Handman, deceased, against the railroad company to recover damages for the killing of plaintiff's intestate. The verdict and judgment were in favor of the plaintiff below. The company appealed in error, and a majority of the Referees have reported in favor of affirmance. The company excepted to the report.

Charles Handman, the plaintiff's intestate, was in the employment of the railroad company as a fireman on one of its locomotive engines. He was instantly killed by the explosion of the boiler of the engine while standing upon the track of the road at Chattanooga, just before the starting of the train. The gravamen of the action was the negligence of the company and its engineer in using an engine, the boiler

and machinery of which were defective and dangerous. The engine had been fired up and prepared for the starting of the train on the morning of the accident. By a rule of the company, the engineer in charge of an engine was required to be on hand thirty minutes before the time fixed for the departure of the train. On this occasion, the proof was that the engineer did not comply with the rule, and only reached the train within five minutes of the time for starting. The court charged the jury that if the proof satisfied them that the engineer was required by a regulation of the company to be at the engine thirty minutes before the time of starting, and that he was not at his post for the time required, and were further satisfied that his delay was the proximate cause of the accident, then the plaintiff would be entitled to recover. Error is assigned on this charge.

In this State, we have adopted the general rule, established by the authorities, regulating the relative rights of master and servant. The servant on entering into service knows, or is taken to know, that there are extraordinary dangers inseparable from such service, which human care and foresight cannot always guard against. If he voluntarily engages to serve in view of all the hazards to which he will be exposed, it is well settled that as between himself and his employer, he undertakes to run all the ordinary risks of the service; and this includes the risk of injuries, not only from his own want of skill and care, but likewise the risk of injuries from the negligence of his fellow-servants: Per McKinney, J., in *Nashville & Chat-*

tanooga Railroad Company v. *Elliott*, 1 Cold., 611, 616. The qualifications of the rule, some of them peculiar to this State, need not be particularly noticed, but are illustrated by *Railroad* v. *Carroll*, 6 Heis., 347; *Guthrie* v. *Railroad Company*, 11 Lea, 372; *Railroad* v. *Gurley*, 12 Lea, 46; *Railroad* v. *Bowler*, 9 Heis., 866.

The leading case in our books is *Fox* v. *Sandford*, 4 Sneed, 36. The action in that case was brought by an employe against his employer and a co-employe to recover damages for an injury sustained in the work for which he was employed. The employers were contractors for the erection of a house. The plaintiff was a hand hired to work thereon, and the co-employe sued was also a hired hand "and foreman of the job." The accident by which plaintiff sustained injury was occasioned by the foreman in paying out the guy-rope of a derrick, the employers not being present at the time, and having given no orders leading to the result. It was held that where two persons are acting in a common employment under the same principal, if one is injured by the negligence, unskillfulness or rashness of the other, the principal was not liable to the injured party in an action grounded alone upon such negligence in the employe. The principle thus enunciated was followed in *Coggin* v. *Railroad Company*, Thomp. Cases, 142, by sustaining a demurrer to a declaration which showed upon its face that the injury complained of was occasioned by the carelessness of other servants in a common service. It was again followed, without citing the particular case, in the *Nashville & Chattanooga Railroad Company* v. *Elliott*, 1 Cold.,

611. That was a suit brought by "a hand on a locomotive engine whose business was to pass wood from the tender to the fireman," to recover damages sustained by the engine running off the track. The accident may have happened according to the proof, because the engine was not adapted to run on the particular curve of the road, or because the engineer neglected to wet the rails as he had been previously in the habit of doing at this place. In the former case the company would be liable, because the knowledge of the engineer of the defect in the locomotive would be knowledge of the company, and it not appearing that the injured employe was aware of the defect. But, say the court, if the difficulty of passing the particular place might have been in whole or in part obviated by wetting the rails, and if the engineer, whose duty it was to have taken this precaution if necessary, neglected to do so, it would have been a proper inquiry for the consideration of the jury whether this negligence of the engineer caused or contributed to the running off of the engine. "And if this were so," it was added, "the case would be governed by the principle before alluded to, that where several servants are employed in a common service, and one of them suffers an injury by the neglect or want of care of another, while they are jointly engaged in the same service, he cannot recover against the employer for such injury, in the absence of any fault on his part, because the injury was occasioned by the negligence of a fellow-servant, and not of the employer, the hazard of injury, not only from his own want of proper care and neg-

ligence, but on the part of his fellow-servants also being one of the risks which, as between himself and employer, he is supposed to have taken upon himself by the contract."

These cases not only settle the general principle which regulates the servant's right of recovery against the master, but directly meet the point which has been suggested, that the principle does not apply where the injury results from the negligence of a co servant who is the immediate superior of the injured servant. The "foreman of the job" in *Fox* v. *Sandford*, was the immediate superior of the plaintiff, a hand hired to work on that job. The engineer of the locomotive in the case of the *Nashville & Chattanooga Railroad Company* v. *Elliott* was the immediate superior of the plaintiff, a fireman or assistant fireman on the same engine. The mere fact that the negligent servant is, in his grade of employment, superior to the servant injured does not take the case out of the rule. Nor does the mere fact that the negligent servant is the equal or the inferior in grade of the injured servant: *Ragsdale* v. *Memphis & Charleston Railroad Company*, 3 Baxt., 426. They are still fellow-servants in the common service, and each must take the risk of the negligence of the other: 2 Thomp. on Neg., 1026, 1028, 1034. And it has been expressly held by other courts that an engineer and fireman, who work together at or on the same engine, are fellow-servants within the rule: *Jones* v. *Yeager*, 2 Dill., 64; *Caldwell* v. *Brown*, 53 Pa. St., 453. In order to charge the master, the superior servant must so far stand in the

place of the master as to be charged, in the particular matter, with the performance of a duty towards the inferior servant which, under the law, the master owes to such servant: 2 Thomp. on Neg. 1031. "In order to recover," says Judge McFarland, "the plaintiff must show that his injury resulted from the carelessness or want of skill of some one who, in the particular matter, stands in the place of the master": *Railroad Company* v. *Wheless*, 10 Lea, 741, 748. See also *Knoxville Iron Company* v. *Dobson*, 7 Lea, 367, the opinion in which is delivered by the same eminent Judge. The *Elliott* case, as we have seen, clearly illustrates the distinction between the mere personal negligence of a superior fellow-servant, and his negligence in a matter in which he stands in the place of the master, who, under the law, owes a duty in that matter to the servant. And another exception to the rule is where the injury to the inferior employe is occasioned by the direct order of the immediate superior in a sudden exigency. This exception is illustrated by the cases of *Railroad* v. *Bowler*, 9 Heis., 866, and *Railroad* v. *Duffield*, 12 Lea, 63.

In the case before us, the engineer gave no order to the intestate, and exercised no authority over him which contributed to the injury. He did not stand in the place of the master, so far as the particular negligence in question was concerned, for the performance of any duty which, under the law, the master was bound to perform for the protection of the servant. He was simply negligent in complying with a rule of the company adopted for his guidance. It was

a case of personal negligence, such as the intestate in accepting his own employment undertook to risk. Whether the negligence could in any sense be considered a proximate cause of the particular injury, it is unnecessary to consider.

The only negligence referred to in that part of the charge of the trial judge which we have discussed is the personal negligence of the engineer in failing to come to his engine sooner. The negligence of the company, if any, in relation to supposed defects in the engine, because of the knowledge of the engineer of those defects, has not been considered. The objection to the charge on the latter point is not so much to what it contains, as to its failure to state in the same connection the effect of the knowledge of the plaintiff's intestate of the same defects. In ordinary cases, the jury should be told that to authorize a recovery these two things must concur. Knowledge on the part of the master or its equivalent negligent ignorance, and a want of knowledge on the part of the servant or its equivalent excusable ignorance. If the knowledge or the ignorance of the master and servant in respect to the character of the machine are equal, so that both are either without fault or in equal fault, the servant cannot recover: 2 Thomp. Neg., 995, 1009; *East Tennessee, Virginia & Georgia Railroad Company* v. *Hodges*, 2 Leg. Rep., 6; *Nashville, Chattanooga & St. Louis Railway* v. *Wheless*, 10 Lea, 741.

The report of the Referees will be set aside, the judgment below reversed, and the cause remanded for a new trial.

COOKE, J., delivered the following dissenting opinion:

I dissent because there is, in my judgment, no evidence tending to show that the explosion was caused by the failure of the engineer to be at the engine thirty minutes before the time of starting, and conceding the correctness of the legal proposition discussed in the opinion of the majority, it was in this case a mere abstraction which could not injure the defendant: 3 Head, 331; 3 Sneed, 434; 8 Yer., 249; 4 Baxt., 364; 1 Lea, 300.

As to the objection to the charge suggested in relation to the knowledge of defects on part of the engineer, etc., the charge was correct as far as it went, and there was no request for any further or more specific instruction as to the effect of the knowledge of such defects on part of the deceased: 2 Hum., 516; 2 Cold., 348.

East Tennessee, Virginia & Georgia Railroad Company v. Joseph H. Stewart.

1. Employer and Employe. *Pleadings and practice. Damages. Burden of proof.* In an action by an employe against his employer to recover damages for an injury to the plaintiff caused by a defective machine or tool, the burden of proof is upon the plaintiff, and it was therefore error in the trial judge to charge that the burden of proof was upon the defendant to show that the machine or tool was suitable and sufficient.

2. Pleadings and Practice. *Evidence. Burden of proof.* As a general rule, proof of the mere fact of injury will not, without more, establish negligence on the part of the defendant so as to shift the burden of proof.

3. Same. *Same. Negligence.* The cases in which proof of the injury and that it was caused by the defendant will entitle the plaintiff to recover in the absence of countervailing testimony, are cases in which the evidence that establishes the injury establishes also facts and circumstances from which negligence on the part of the defendant may be fairly implied.

4. Same. *Same. Same. Burden of proof.* Where a fireman on a locomotive was injured by a jet of steam from an oil cup, which he was in the act of filling, and the proof left it doubtful whether the accident was the result of his own negligence or occasioned by a defect in the cup or its appliances, the case would be within the general rule, not the exception, and the burden of proof would rest on the plaintiff.

FROM SULLIVAN.

Appeal in error from the Circuit Court of Sullivan county. N. Hacker, J.

W. D. Haynes, N. M. Taylor and W. M. Baxter for Railroad.

C. J. St. John and Thomas Curtin for Stewart.

Cooper, J., delivered the opinion of the court.

Action brought by Stewart against the railroad company for personal injuries. The verdict and judgment were in favor of Stewart, and the company appealed in error. The Referees report that the judgment should be reversed for error in the charge of the trial judge to the jury. Both parties except, opening the whole case.

Stewart was injured in the face and eyes by an explosion of steam and tallow from an oil cup. There are two oil cups on a locomotive, one on each side about the center of the steam chest, and they require to be filled for about every seventy miles of travel. Each cup connects with the steam chest by a pipe, which enters the bottom of the cup and runs up the center, the access of steam being controlled by a stop cock. There is also a waste cock at the bottom of the cup by which its contents may be drained off. When the cups are filled, the steam is first shut off, the waste cock opened, and the top of the cup raised and removed to one side by a yoke working a screw. Stewart had been a fireman on railroad locomotives for two or three years before the injury complained of, and in the employment of the defendant below for at least a year. It was a part of his duty as a fireman to fill the oil cups. The company had the same kind of cup on a number of its engines, and Stewart was, he says, familiar with them, or to use his own words, "knew all about the cup so far as putting in tallow

was concerned." He had made one trip on the particular engine about ten days before the accident occurred, the oil cups being then all right. On the day of the injury he had filled both cups in the morning before the engine was hot, and could not therefore tell if the oil cups were right. After running about seventy miles the train stopped, and he undertook to fill the cups. He filled the right hand cup finding it all right, and then went to the left hand cup. His statement then is: "I first shut off steam by closing the feed valve (meaning the valve of the steam cock). I then opened the waste cock. I then took off the yoke, but the cap still remained on the oil cup. I tried to remove the cap with my hand, but it was closed tight and could not be moved. I then set my oil can on the left, and stooped over to get a block that was on the engine to knock the cap off the cup. The block was on the right. While I was stooping the cap flew off, and the tallow flew in my face and eyes." The witness adds: "The pee on steam cock must have wasted or leaked. This is all the way I can account for the explosion." The other witnesses say that it is impossible to have an explosion of an oil cup unless the valve is left open, or the steam is escaping because of some defect in the stop cock. It is obvious therefore that the explosion was occasioned either by the negligence of the plaintiff in not properly closing the steam cock, or from some defect in the cock which allowed a sufficient quantity of steam to pass through the tube projecting into the cup. In the latter event, the defect was one which could not

be seen from the outside, but the existence of which could easily have been ascertained by means of the waste cock.

The trial judge charged the jury that: "The burden of proof is on the defendant to show that its oil cup and appliances were suitable, sufficient, etc., under the instructions heretofore given." These instructions were that railroad companies are required to furnish their employes suitable and safe machinery and tools with which to operate, subject to the qualification that the employe takes the risk of defects known to him at the time of employment, or which may afterwards become known, and for the repair whereof no promise has been made by the master after notice. But, as is well said by the counsel of the railroad company, the obligation to furnish safe and suitable machinery is one thing, and the burden of proof when an accident occurs is another and a different thing. And the question presented by the judge's charge, upon the supposition that the injury to the plaintiff below was occasioned by a defect in the oil cup or its appliances, is whether the burden of showing the defect rested upon the plaintiff or not.

The gist of the action, as set out in the declaration, is that the explosion, which occasioned the injuries sued for, was "caused by reason of said oil cup being defective and not kept in proper repair." The obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue: 1 Greenl. Ev., sec. 74. "No one," says Mr. Justice Field, "is responsible for injuries resulting from inev-

itable accident whilst engaged in a lawful business. A party charging negligence as a ground of action must prove it": *The Nitro Glycerine Case*, 15 Wall., 524. The presumption of law, moreover, is always in favor of the performance of duty: *Polk* v. *Kirtland*, 9 Heis., 292, 295. And consequently, in a suit between employe and employer for an injury caused by a defective machine or tool, the presumption would be in favor of the employer, and must be overcome by proof *Railroad* v. *Gurley*, 12 Lea, 46, 58. And accordingly in *Railroad* v. *Duffield*, 12 Lea, 63, 71, which was such a case, it was expressly said that the trial judge erred in charging that "the burden of proof is on the defendant to show that it provided the plaintiff with tools and implements safe, suitable and sufficient;" and also erred in refusing to charge, as requested by the company, that "the law presumed that the master had performed the duty the law imposes to furnish safe and suitable machinery, and the burden of proof is on the plaintiff to show that this duty has not been performed."

There are cases in which proof of the injury complained of, and that it was caused by the railroad company will entitle the plaintiff to recover unless rebutted by other testimony. And it is usual to say in such cases that the requisite proof on the part of the plaintiff shifts the burden of proof upon the defendant. It has been repeatedly held in this State that where an injury, either to persons or stock, is shown to have been occasioned by the moving train of a railroad company, it then becomes incumbent on

the company to show that it exercised all the care it was bound to exercise, in doing which it would necessarily establish the sufficiency and safety of its machinery: *Railroad* v. *Horne*, 1 Cold., 72; *Railroad* v. *Connor*, 9 Heis., 19. So, where the plaintiff's house is proved to have been burned by sparks from the defendant's engine, it devolves on the company to show that the engine was properly constructed, and in good condition: *Burke* v. *Railroad*, 7 Heis., 451; *Simpson* v. *Railroad*, 5 Lea, 456. So, where the plaintiff has established the existence of a nuisance to his dwelling-house by the coal dust arising from the company's coal chutes or boxes, the company must show proper care in the erection and use of the chutes or boxes: *Sallee* v. *Railroad* (manuscript opinion at this term). So, the mere explosion of a steam boiler may justify the jury in finding negligence as an inference of fact: *Young* v. *Bransford*, 12 Lea, 232. The rule is otherwise in the case of injury to a passenger or a trespasser: *Railroad* v. *Mitchell*, 11 Heis., 400; *Sommers* v. *Railroad*, 7 Lea, 204. Unless indeed, in the case of a passenger, the proof which establishes the injury shows also that it was occasioned in a particular manner that in itself would imply negligence: *Curtis* v. *Railroad Company*, 18 N. Y., 543; *Holbrook* v. *Railroad. Company*, 12 N. Y., 236. The reason of the rule, therefore, whenever it is applied, is that the evidence which establishes the injury establishes also facts and circumstances from which negligence on the part of the wrong-doer may be fairly implied: 2 Pars. Cont., 224. Or, as it is otherwise expressed, *res ipsa loquitur*.

The general rule undoubtedly is that the mere fact that the injury happened to the plaintiff will not, without more, amount to evidence of negligence on the part of the defendant: 2 Thomp. on Neg., 1227. The duty of making out his case is upon the plaintiff, and it is not strictly accurate to say that the burden of proof is shifted to the other side. The proper charge would be that if the jury were satisfied from the proof that the injury had been occasioned by the defendant under such circumstances as to show negligence on the part of the defendant, then they should find for the plaintiff unless the proof further satisfied them that the machinery of the company was in good condition, and up to the present state of the art, so as to prevent as far as possible the happening of such accidents as the one complained of. The liability of the company to an employe would be further limited by the usual qualifications growing out of the relation of master and servant.

The proof in the case before us shows that the plaintiff was injured by a jet of steam from the oil cup. But it also shows that the accident might have been occasioned by the negligence of the plaintiff himself in failing to close the steam cock. The facts and circumstances do not necessarily or fairly carry with them an implication of negligence on the part of the company. To raise the presumption of negligence it should further appear that the injured party was without fault: *Railroad* v. *Walrath*, 38 Ohio St., 461. The burden of proof was upon the plaintiff to show negligence. And his Honor, the trial judge, was in error in charging otherwise.

Error is assigned upon the admission, over the objection of the defendant, of the deposition of the wife of the plaintiff. The objections now made are that the wife's information about the case was obtained "by virtue, or in consequence of the marital relation," and that her testimony was mere hearsay. The record shows that the plaintiff offered to read the deposition, "to which defendant objected," and the court permitted it to be read. The objection thus made would only go to the competency of the witness: *Miller* v. *State*, 12 Lea, 225, and cases therein cited. The witness was competent to prove facts within her knowledge, and her testimony only inadmissible as to "any matter which occurred between them (husband and wife), by virtue of or in consequence of the marital relation": Act of 1879, ch. 200.

Other errors relied on are not likely to occur upon another trial.

The report of the Referees will be confirmed in accordance with this opinion, the judgment below reversed, and the cause remanded for a new trial.

GIBSON, LEE & CO. v. D. B. CARLIN.

1. PLEADING AND PRACTICE. *Suit for failure to perform contract. What may be recovered.* It is the settled law of this State, confirmed by a declatory statute, that a plaintiff, who has not performed his contract, may nevertheless recover compensation for the partial performance equal to, and limited by the value of the benefit conferred, the defendant, by the very statement of the principle, being entitled to abate the recovery by the damages sustained, these damages extending to such as might be recovered by a cross-action.

2. SAME. *Same. Same. Recoupment.* The defense of recoupment in such cases, which would be good at law without a cross-action, would be equally good in equity without a cross-bill.

3. SAME. *Same. Measure of damages.* The measure of damages in such cases is usually the difference between the contract price and the value of the work as done, or the cost of replacing the work so as to make it equal to the work contracted for, to which may be added the actual damages from any injury, the proximate result of the breach of contract, occurring before the accrual of the defendant's right of action for the breach, or within the reasonable time thereafter required to replace the defective work.

4. SAME. *Same. Same. Recoupment.* A mechanic, who undertakes to put on a new tin roof on a building, and fails to perform his contract, is liable to have the contract price recouped by deduction for the defective work, and the actual injury to the building from rain water penetrating such roof by reason of the defective work.

5. SAME. *Same. Same.* Although a contract stipulate for the completion of work by a specified time, yet if both parties consent to an extension of the time, the liability of the mechanic for injury occasioned by defects in the work will continue during such extension, and until the expiration of a reasonable time thereafter within which to rectify the defects.

FROM HAMILTON.

Appeal from the Chancery Court at Chattanooga. W. M. BRADFORD, Ch.

J. A. CALDWELL for complainants.

ELDER & WHITE for defendant.

COOPER, J., delivered the opinion of the court.

Bill to enforce the mechanic's lien upon the following writing:

"CHATTANOOGA, TENN., December 29, 1881.

Mr. D. B. Carlin, City. Dear Sir—We will furnish the material, and put on good tin and give it two coats of mineral paint and boiled oil, and put on your roof on your building on Ninth street, 40x44, for one hundred and thitty-three dollars. This will include taking off the tar roof.

Very respectfully, GIBSON, LEE & CO.

The above contract is accepted, Dec. 29, 1881. D. B. CARLIN.

And work to be done in ten or twelve days from date."

In addition to the amount specified in the writing, the complainants claim $13.35 for extra work in capping the side or fire walls of the building. The defendant in his answer contends that the writing produced does not contain the entire contract, and that the capping of the walls, for which extra compensation is claimed, was included in the contract. He further insists that the contract has never been complied with—the work being so negligently and badly done that the roof has always leaked, and still continues to leak when it rains, to the great damage of the building. He claims a deduction from the contract price by way of recoupment. The chancellor granted the complainants all the relief sought without deduction. The Referees, upon Carlin's appeal, have sustained his defenses. The complainants except to their report.

The new roof was put on within the ten or twelve days' limitation of the written contract made an ex-

hibit to the bill, but the complainants' foreman admits that some leaks were found which were not closed for several days, and some leaks it is otherwise clearly shown have never been remedied. The capping of the side parapet or fire walls was not done before February 6th, and perhaps later. The foreman of complainants testifies that he left their service in May, at which time one coat of paint, and the second coat on half the roof had been put on, the other half of the second coat being finished, he says, sometime afterwards. There was therefore no compliance by the complainants with the contract in point of time.

It clearly appears that the written proposition and acceptance exhibited with the bill do not contain the entire contract of the parties. The complainant, Gibson, who carried on the negotiations and made the contract with the defendant, testifies himself that the defendant, as a part of the contract, agreed to have a brick-mason present when the old roof was taken off to repair and cap the side walls of the building, without which he admits the roof could not be made tight unless the walls were capped with tin. He further testifies that it was a part of the agreement that the contract price was to be paid by the defendant by a cash payment of $25 when the work was completed, and the residue in monthly installments of $25 each for which the defendant was to give his notes with a certain specified person as surety. It is also shown by the proof that the defendant, as his part of the contract, was to furnish new sheeting for the roof and a workman to put it on as it might be

needed when the tin was laid, and that he did furnish the workman and the sheeting, and that the new sheeting was put on as directed by the complainants' workman. A contract partly in writing and partly in parol is an oral contract: *Smith* v. *O'Donnell*, 8 Lea, 468.

The parties differ as to whether the capping of the fire walls was embraced in the contract. The complainant, Gibson, testifies that he and the defendant discussed the matter, and that the agreement reached was that the walls were to be rebuilt to their original height by the defendant, and cemented on top. In another place he says that the defendant had agreed to have a mason present when the old roof was taken off to repair the walls. The defendant denies that any such agreement was made. On the contrary, he testifies that, owing to his frequent and unavoidable absences from the city, he requested the complainants to make him a proposition covering all necessary work on the parapet walls so as to make a good roof. He adds, in support of his assertion, that complainant Gibson had offered to put on a tin roof for $96, if defendant would take off the old roof and do the other work. Gibson admits that he may have made that offer, as plain roofing without painting was then at $6 a square, which would have amounted to the sum mentioned. It elsewhere appears that the cost of taking off the old roof was about $3, and the cost of painting about $16. The defendant insists that the difference between these sums and the contract price is what was agreed upon for the work on the walls.

The inference, as the Referees say, was a fair one. The written proposition of the complainants is that they "will furnish the material, and put on good tin, * * and put on your roof on your building, * * 40x44." The meaning would seem to be that the complainants would "furnish the material," and do the work necessary to make a good roof. And this would be a legitimate construction to put upon the language unless it is otherwise shown that the defendant was to furnish new sheeting and a workman to put it on, and that he complied with this part of the contract. There is nothing, except complainant Gibson's testimony, to show that defendant was to do anything about the parapet walls. And a most significant fact is that while the defendant did, through his son as his agent, he himself being absent from the city, furnish new sheeting and a workman, not a word was said by the complainants' workman to the son about any expected mason. The contract describes the roof as 40x44 feet. The building fronts 40 feet from outside wall to outside wall, and runs back 42 feet. The estimate of the contract covers the walls. And the complainants' principal workman, who was the acting boss of the work, testifies that on the evening of the day the roof was put on, he told the foreman of the complainants that the walls had to be capped, that there was soldering to do, and gutters to be put up, and the foreman replied that he would have it done. The circumstances sustain the defendant's contention, and we concur with the Referees in thinking that the necessary work on the parapet walls was included in the contract.

The front parapet wall was run up three feet above the roof, and covered originally with plank. One of the side walls is said by the defendant to have been twelve inches high, and the other six inches for about half its length. The other testimony shows that these side walls were down to the roof in some places; in others two or three inches high, and one and one-half feet in others. When the new roof was put on the tin was run up about three inches on the front parapet, and "flashed" or inserted between the brick. The same process was pursued on the side walls for three or four feet from the front wall. As to the residue of the side walls nothing was done, and the water, whenever it rained, ran down between the tin and these walls. The flashing on the front wall was not properly done. It should, according to the testimony of an impartial tinner, have been pointed with cement. "It is generally expected," adds this witness, "that the tinner will do this, or have it done when it is necessary to be done." But, as we have seen, the contract in this case requires the complainants to do all that was necessary to be done on the parapet walls to make a good roof. By reason of the failure to cement the flashing, the inserted tin drew out, allowing rain water to run down the wall to the sheeting, and drain off at the lowest points, injuring the plaster and paper on the walls, and compelling the tenants to use vessels to catch the flow.

After the complainants had capped the side walls with tin, the roof ceased to leak along these walls, but the leaks continued along the front of the house,

and in some places through the roof. The tin was put on in standing seams, which will leak if flooded. "These seams," says the principal workman who put on the roof, "were not constructed so as to prevent leaking if flooded with water." The principal cause of the leaks in the body of the roof was a sunk place of twenty-four square feet. One witness says three feet by eight feet, and another six feet by four feet, towards the rear of the building near the center. This was occasioned probably by the sinking of a joist, but might easily have been remedied in putting on the new sheeting. The water might also have been prevented running through the seams by flat locking and soldering them. Neither of these courses was pursued. The complainants' principal workman testifies on these points: "I did not have the carpenter to raise the roof, nor did I put on a flat lock seam because I did not think it necessary." The witness adds that it rained the day the roof was put on, and the water stood in this low place to the depth of a quarter of an inch, and was therefore not deep enough to flood the seams. The testimony, however, is that the seams were afterwards frequently flooded.

It is obvious from the foregoing facts that the complainants not only failed to perform their part of the contract in time, but failed to do the work properly. The complainant, Gibson, admits in his deposition that the agreement of his firm was to put on a good roof, and a good roof, all the witnesses concur in saying, would be one that would keep out the rain. The work failed to accomplish this object, and was conse-

quently not according to the contract. But it was also so negligently and badly done that the building of the defendant was actually damaged by the rain water which found its way along the parapet walls and through the roof.

According to the strict principles of the common law it was difficult to sustain an action for compensation in favor of a party who had violated or failed to perform his part of a specific contract. For the existence of the contract was a defense to an action for a *quantum meruit*, and the breach of the contract forbade an action upon it. In equity no difficulty lay in the way of an adjustment of the rights of the parties, and the courts of law soon adapted the rules of equity to its forms. From an early day in this State, and independent of statute, it became the settled law that the plaintiff, who has not performed his contract, may nevertheless recover compensation for the partial performance equal to, and limited by the value of the benefit conferred, the defendant, by the very statement of the principle, being entitled to abate the recovery by the damages sustained: *Irwin* v. *Bell*, 1 Tenn., 485; *Stump* v. *Estill*, Peck, 175; *Porter* v. *Woods*, 3 Hum., 56. The recoupment by the defendant, as his defense was called, was made simply by, or in ascertaining the plaintiff's *quantum meruit*, and might be by plea without cross-action: *Whitaker* v. *Pullen*, 3 Hum., 466; *Overton* v. *Phelan*, 2 Head, 445. Recoupment, as said by Fogg, Special Judge, in *Pettes* v. *Tennessee Manufacturing Company*, 1 Sneed, 381, originally implied a deduction from the plaintiff's demand

arising from payment or some other analogous fact, but has been extended in this class of cases, *ex necessitate*, to meet conflicting equities, to counter claims or such damages as might be recovered in a cross-action for the breach of the contract. The statute, Code section 2918, is merely declaratory of the pre-existing law. A defense in such a case which would be good at law without a cross action, would also be good in equity without a cross-bill, for in both courts, the recoupment would be made simply by, or in ascertaining the plaintiff's *quantum meruit*.

But the defendant is mistaken in supposing that he may do nothing, and yet hold the complainants liable for all damages which may accrue at any time thereafter from the defective work. In this class of cases as in the case of breaches of contract for personal service, the law requires from the injured party, after he has accepted or used the work, active diligence to prevent more damage than is necessary. He can charge the delinquent party for such damages only as, by reasonable effort and expense, he could not prevent: *Walker* v. *Ellis*, 1 Sneed, 515; 2 Greenl. Ev., sec. 261. The measure of damages is ordinarily the difference between the contract price and the value of the work as done for merely inferior work, and for defective work the cost of replacing it so as to make it equal to the work contracted for: *Parker* v. *Steed*, 1 Lea, 206 *Bush* v. *Jones*, 2 Tenn. Ch., 190. To these may be added damages for any injury the proximate result of the breach of contract, and which may fairly be considered to have been in the contemplation of the par-

ties, and which could be recovered in a cross-action: *Pettee* v. *Tennessee Manufacturing Company*, 1 Sneed, 381. Of course, injury to a building from rain would be within the contemplation of the parties, and the proximate result of defective work under a contract the very object of which was to prevent that very injury.

The defendant's own proof shows, by itemized statements of witnesses, that the "flashing" on the front parapet wall could have been properly cemented, and the sunken part of the roof elevated and the open seams soldered for twenty or thirty dollars. It was the duty of the complainants to do this work within the time allowed by the contract, or any additional contract, for the completion of the roof in question. It was the duty of the defendant, at his peril, to rectify the defects within a reasonable time thereafter.

The real difficulty in this case is to fix that time, which not only regulates the deduction for inferior and defective work, but limits the recovery of damages the proximate result of the defects. If both parties had treated the contract as at an end after the expiration of the ten or twelve days stipulated for its completion, the defendant's right of action for a breach of the contract would then have accrued, and the defendant would only have been allowed a reasonable time thereafter to do the work necessary to prevent further damage to the building. The proof shows that this work might have been done in two or three hours. A few days delay could alone be considered as reasonable.

The parties did not, however, treat the contract as

at an end after the lapse of the twelve days specified. On the contrary the defendant repeatedly urged the complainants to do the work, and they did work thereafter under the contract. By mutual consent the time was extended. The fire walls were not capped before the sixth of February, and the painting of the roof not finished until after the complainants' foreman, as he testifies, left their employment in May. Under the circumstances, it was for the complainants to show, by notice to the defendant, or some formal act after the painting was completed, such as a demand of payment, that they considered the work done. In the uncertainty in which the proof of the complainants has left this point, we feel justified in fixing the first of June as the end of the reasonable time in which the defendant should have protected his building. Up to this time, the defendant will be allowed to recoup the contract price by proper deductions for the inferior and defective work, and by the damages to the building occasioned by the defective work. The defendant has made no proof of damages limited to this period, and there is proof tending to show that rain water would penetrate his front parapet wall by reason of soft and loose brick therein, and also by reason of a defective wooden cornice on the outside. At what time the wall became pervious to rain does not appear. It must be referred to the master to take proof, and report the deduction for the inferior and defective work, and for any damages accruing on account of the defective work between the removal of the old roof and the first of June thereafter.

The chancellor's decree will be reversed, and a decree rendered here in accordance with the report of the Referees and this opinion. The complainants will pay the costs of this court up to and including the decree rendered, the other costs to await the result of the reference.

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S. R. COULTER *v.* C. B. DAVIS and WIFE.

1. PLEADING AND PRACTICE. *Res adjudicata.* To make a judgment or decree in one suit a bar to another suit between the same parties, it must appear not only that the subject-matter of the two suits are the same, but that the proceedings were for the same object and purpose, the same point being directly in issue.

2. SAME. *When a decree in chancery is no bar to action at law.* A decree in chancery, on final hearing, dismissing a bill filed to perpetually enjoin as a nuisance the flow of water over the complainant's land by reason of a mill-dam, is no defense to an action at law brought by the same party against the same defendant to recover damages for the overflow.

3. SAME. *Issue of nul tiel record triable by court.* The issue of *nul tiel record* joined on a plea of former adjudication which makes no averment of extrinsic facts, is triable alone by the court upon inspection of the record, and it is error to submit the issue to a jury; but if the jury find the facts as the court should have found, the error would not be so material as to require reversal.

FROM BLOUNT.

Appeal in error from the Circuit Court of Blount county. S. A. RODGERS, J.

S. P. ROWAN, W. L. WALKER and E. T. HALL for Coulter.

R. N. HOOD and E. T. CATES for Davis.

COOPER, J., delivered the opinion of the court.

Martin McTeer, owning land on Little Ellijoy Creek, built a dam across the creek, and erected a mill on his land at a time beyond the recollection of the oldest witnesses examined in this case, and continued to run the mill until his death in 1853. He devised the mill property to his wife, Ann McTeer, who died in 1865. Hiram Bogle became her agent in the management of the mill after her husband's death. In 1856, with her consent and approval, the old dam having become so dilapidated as to require rebuilding, Bogle made a parol agreement with one Holland, who owned the adjoining land up the creek, whereby he was permitted to erect, and did erect, a new dam across the creek about 250 yards above the old dam, and bring the water from the pond above the new dam by a ditch or race. The mill continued to be run in this new mode until 1869, when the race filled up, and the mill was abandoned, because the property was then in litigation, commenced after the death of Ann McTeer, and this litigation was not terminated until about 1875. In the meantime Holland had died, and one Knox bought that part of his land adjoining the McTeer tract. Knox built a dam across the creek in 1871, about where Bogle had built his dam under his agreement with Holland, and erected a mill lower down the creek, partly across the ditch

or race dug by Bogle, bringing the water from the pond by the race. One witness locates this mill only fifteen yards from the McTeer line. The mill was at first a saw mill, to which a grist mill was afterwards added. In 1873, Knox sold and conveyed the land to the defendant, C. B. Davis, who afterwards conveyed the same to his wife. In 1875, the McTeer land was sold at chancery sale, and bought by one Boling, to whom the clerk of the court made a deed. In 1876, Boling sold and conveyed the land to the defendant, Coulter, who during that year re-erected a dam across the creek at or within a few feet of the location of the McTeer dam, and built a grist mill run by the water power thus produced. This dam is not as high as the old McTeer dam by probably two feet, and does not consequently back the water in the creek as high as did the old dam. But the level of the water is so raised by the dam that the fall from the wheel of the Davis mill by the lower end of his race is not sufficient to carry off the water, and the wheel "wades," as the witnesses say, whereby the value of the mill is seriously affected.

In this situation of affairs, on October 1, 1878, Davis and wife filed a bill against the defendant, Coulter, setting out the wife's title to the mill property claimed by them, stating that the defendant had erected a dam and mill as hereinbefore mentioned, averring that the effect of the dam was to make their wheel wade eight inches in water and destroy the power, and asking that the dam be declared a nuisance and abated, and the defendant perpetually enjoined

from interfering with the complainant's rights. The defendant answered the bill, and such proceedings were had that on June 11, 1879, the cause was heard by the chancellor and the bill dismissed. The complainants appealed to this court, and the cause was heard by the arbitration court, upon whose recommendation a decree was rendered by this Court on March 16, 1880. The chancellor's decree was: "That the allegations of the bill are met and denied in the answer and not sustained by the evidence, and that complainants are not entitled to the relief sought, or to any relief in this cause," and the bill was dismissed with costs. The decree of this court was: "The court is of opinion and doth decree that the complainants are not entitled to the relief sought, or to any relief in this cause. It is therefore ordered, adjudged and decreed that the decree of the chancellor be and is in all things affirmed, and that complainants' bill be, and the same is dismissed, and the complainants pay all the costs of this court and of the court below."

In the meantime, on July 7, 1879, Davis and wife brought against Coulter the action at law which is now before us, to recover damages for the injury to the wife's mill property by the erection of the defendant's dam. The defendant put in a plea of not guilty, on which issue was joined. Afterwards, and after the decree of this court in the chancery case, the defendant, by leave of the court, filed another plea, relying upon that decree as a bar to the action, averring: "That the cause of action in said cause, and the cause of action in this cause, are one and

the same, and not other or different, and that the parties in interest in said cause and the parties in interest in this cause are one and the same, and occupy the same relative position to each other, and not other or different." The plea concluded with a verification. The replication of the plaintiffs is: "That the alleged case decided by the Supreme Court is not an adjudication of the subject-matter and right of action involved in this suit, and pray that this may be inquired of by the country." The cause was tried, upon these issues, by a jury who found a verdict in favor of the plaintiffs for $854, upon which judgment was rendered. The defendant appealed in error. The Referees have reported in favor of reversing the judgment, upon the ground that the decree in the chancery case is conclusive on the rights of the parties, that the verdict is not sustained by the evidence, and is moreover excessive in amount. The defendants in error have alone filed exceptions.

The only conclusion of law reached by the Referees, to which exception is taken, is the opinion expressed by them that the proceedings in the chancery suit constitute a complete defense to the present suit. In this conclusion the Referees are in error. To make a judgment or decree a bar to another suit between the same parties it must appear or be shown that the subject-matter of the former suit was the same, that the proceedings in that suit were for the same object and purpose as those of the new suit, and that the same issue was joined: *Arnold* v. *Kyle*, 8 Baxt., 319. The adjudication to be conclusive must

be upon the very point directly in issue by the pleadings: *Brewster* v. *Galloway*, 4 Lea, 558. The plea by its averment of facts must meet these requirements: *Riley* v. *Lyons*, 11 Heisk., 246. If the plea in this case be treated as sufficient, the record produced does not sustain it. The object of this suit was to recover damages for the trespass upon the plaintiff's land by the backwater of the defendant's dam. This was the very point directly in issue by the pleadings. The court of chancery has no jurisdiction of such an issue at all. The damages grew out of injury to property, and being unliquidated did not fall within the original jurisdiction, and are expressly excluded from the jurisdiction of the court as extended by statute of 1877, chapter 97, section 1.

The object of the bill in chancery was to perpetually enjoin the nuisance alleged to be created by the dam. The rule of equity in such cases, as settled by our decisions, is that where the injury is immediate and irreparable, or the remedy at law is from the nature of the injury imperfect, chancery will interpose by injunction; but the right must be clear, otherwise equity will not interfere until the right is ascertained at law: *Caldwell* v. *Knott*, 9 Yer., 209: *Lassater* v. *Garrett*, 4 Baxt., 368; *Vaughn* v. *Law*, 1 Hum., 123; *Wall* v. *Cloud*, 3 Hum., 181. All that was settled by the decree of this court in the chancery suit was that the complainant was not entitled to the equitable relief sought because the equity of the bill was met by the answer and not sustained by the proof. The equity of the bill was that the injury was immediate and irre-

parable or the remedy at law imperfect. Under the plea and replication we are confined to the record, and cannot go outside of it, even if the defendant might by proper averments of fact have shaped his plea so as to put in issue the actual ground of decision in the opinion of the arbitrators.

For another reason, the decision could in no event conclude the plaintiff's right of action. The declaration dates the trespasses from 1876, and on divers other days and times down from that year. There is proof tending to show that after the decree of this court in the chancery case, the defendant raised his dam. The decree could only cover the injury at the time of the commencement of the chancery suit. Any expression of opinion beyond the existing state of facts under adjudication would be mere dictum. The plaintiffs had the right to a trial upon the new facts.

In this connection it may be added that the circuit judge was clearly in error in submitting to the jury the issue upon the plea of former adjudication. The plea, as we have seen, relies exclusively upon the record, and the replication is in substance that there is no such record. The issue of *nul tiel record*, is triable alone by the court upon inspection of the record, and it is error to submit the issue to a jury: *Ridley* v. *Buchanan*, 2 Swan, 555; *Hill* v. *State*, 2 Yer., 248. It is only when the plea undertakes to identify the cases by averment of extrinsic facts, that there is a question of fact for a jury: *Hite* v. *State*, 9 Yer., 358. But if, in a case of improper submission to them, the jury find as the court should have found,

the error is not so material as to require a reversal: *Coffee* v. *Neely*, 2 Heis., 304, The jury in the present instance must have found, in accordance with the conclusion of this court as above expressed, that the former adjudication was not upon the point of issue in this case. And the circuit judge only followed the lead of the counsel on both sides in treating the issue joined upon the plea as a question for the jury.

The only other material findings of the Referees which are excepted to are upon matters of fact. The Referees have treated the case in their report as if it were a chancery case, in which it was their duty to ascertain the facts for themselves. They merely say that such a fact is not satisfactorily established, or that they are of opinion the fact is as they state it. No doubt their conclusion, that the proceedings in the chancery court constituted a complete defense to this suit, tended to mislead them as to the importance of their rulings on the facts. The issues in this case were tried by a jury, and the settled rule of this court is not to disturb the verdict of a jury if there is any evidence to sustain it. In no one of the conclusions excepted to do the Referees say that there is no evidence to sustain the contrary finding of the jury. And upon examinaton we find that in every instance there is conflicting evidence, and upon every point covered by the verdict of the jury the preponderance is in favor of their finding. The Referees say that the plaintiff below failed to establish the fact satisfactorily that the plaintiff in error raised his dam after the decision of the chancery suit and before the

bringing of the present suit. Upon this point the weight of evidence may be in favor of the conclusion of the Referees, but there is evidence to the contrary, and the fact was immaterial in view of the actual verdict. On every other point the preponderance of testimony is in favor of the verdict.

The material issue submitted to the jury was, whether the prescriptive right of the McTeers to flow water by a dam on the land of the plaintiff below was abandoned by the arrangement made with Holland in 1856, and what was done thereafter by those under whom the plaintiff in error claims? The Referees say on this point that they do not think that the prescriptive right to maintain the old dam had been abandoned in 1856, and that the court of arbitration had held the same way. Here again, it is obvious, that the supposed finding of the court of arbitrators stood in the way of the exercise by the Referees of their own best judgment. If untrammeled, they would have seen that the court of arbitration did not have before them the evidence of Hiram Bogle, the agent of Ann McTeer, who made the arrangement with Holland in 1856, and conducted the mill under it until 1869. He testifies positively that his agreement with Holland was that, in consideration of the permission given by Holland to erect the new dam and dig the ditch on his land, the land overflowed by the old dam was to be surrendered to Holland. He further testifies that the terms of the agreement were fully made known to Ann McTeer, his principal, and agreed to by her, although he cannot recollect that the word abandon

was used. There is no testimony in conflict with that of this witness, and the jury were of course well warranted from this testimony, and from what took place in accordance with the arrangement made to find an abandonment of the old prescriptive right, there being an absolute non-user of the old right for just about twenty years.

The only other material opinion or finding announced by the Referees is that the damages are excessive. But the only evidence touching the extent of damage is that the pecuniary loss arising from the flooding of the plaintiffs' wheel is from one to two dollars a day. The jury manifestly found that the old prescriptive right was lost by abandonment. In that view, the defendant below was a trespasser from the time of the completion of his dam in 1876. From that date until the commencement of this suit in July, 1879, would be over two and a half years. Even the lowest estimate of the witnesses would run up the damages during that length of time to about the sum found by the jury. And we can see no ground for saying that there is no evidence to sustain the verdict, or that the damages are, in view of the testimony, excessive.

The exceptions to the report of the Referees must be sustained, and the judgment of the circuit court affirmed with costs.

W. S. SMITH, Trustee, *v.* W. R. NEILSON *et al.*

1. WILLS, FOREIGN. *Will pass lands. When. Authentication.* A foreign will, proved and recorded in the State of the testator's domicil according to the requirement of the laws of this State as prescribed by the Code, section 2182, will pass lands in this State as between the parties without record or registration here, and a copy of such will duly authenticated under the act of Congress will be evidence.

2. MORTGAGE. *Subsequent assignment.* A mortgage of the interest which the mortgagor has in land under an agreement to convey, although without any covenant of warranty, if duly registered, will prevail over a subsequent trust assignment to secure borrowed money with covenant of warranty, the grantor acquiring the legal title after both conveyances.

3. LIEN. *Subrogation. Resulting trust.* The use of borrowed money for the purpose of paying off a lien on land will not, without more, give the lender a right to be subrogated to the lien, nor create in his favor a resulting trust.

4. SAME. *Receiver. Rent.* A junior lien creditor who impounds the property by the appointment of a receiver will be entitled to the net proceeds of the rent until the older lien is properly enforced against the rent or the property.

FROM GREENE.

Appeal from the Chancery Court at Greeneville. H. C. SMITH, Ch.

H. H. INGERSOLL for complainant.

J. P. EVANS and LUCKY & YOE for defendants.

COOPER, J., delivered the opinion of the court.

Under an attachment bill filed in the year 1865 by one Scruggs against W. R. Neilson, the land of Neilson

was sold and bought by Scruggs. Afterwards, under a similar attachment bill, one Evans had his debt against Neilson fixed upon the land, and was subrogated to the right of Scruggs. On January 1, 1868, Evans transferred his interest in the land to one Hancher. On October 22, 1868, Hancher sold the land, consisting of 519 acres, to Easterly for $7,868, and executed to him a bond to make him a title upon payment of the purchase money. On the same day, Easterly and Neilson entered into a written agreement in which it is recited that they had agreed to become co-partners in the purchase of the land from Hancher on the terms of the title bond from Hancher to Easterly, that Neilson was to pay one-half of the purchase money by January 1, 1870, and to forfeit his interest in case of failure. On November 12, 1868, Easterly and one Bell entered into a written agreement by which Bell became an equal partner with Easterly in the purchase from Hancher, and "fully and equally bound" in the bond of Easterly to Neilson. At the time of these several transactions Neilson was living on the land, and by agreement his one-half of the land was set off to him by a division line, up to which he continued his possession. On December 25, 1869, Neilson borrowed from one Foster $2,400, for which he executed his note with his father-in-law, Wm. Smith, who lived in South Carolina, as his surety. The money was borrowed for the purpose of paying for his interest in the land, and was so applied. On the same day, in order to indemnify and save Smith harmless from loss by reason

of his said suretyship, Neilson conveyed to him in mortgage the land allotted to him by agreement with Easterly and Bell, describing it as about 260 acres, lying on Nolachucky river, in Greene county, Tennessee, adjoining the lands of certain persons named, "being the one-half of the original tract on which the said Neilson now resides, the same having been divided on the 8th of October last between himself and Bell and Easterly." This instrument was duly proved and registered in the following month of March. In January and February, 1870, Neilson paid on Easterly's note to Hancher, $2,965.61. This left a balance of about $1,200 on Neilson's share of the debt to Hancher, which was paid by Bell. On December 13, 1870. Hancher made a formal assignment or conveyance of his interest in the land to Easterly and Bell. On the 15th of the same month Easterly and Bell gave to Neilson their bond for title to his part of the land upon the payment of a note to Bell, due at twelve months from that date, for about $1,630. The consideration of this note consisted of the balance of purchase money due from Neilson for his part of the land, which had been paid by Bell, and a private or individual debt of Neilson to Bell not connected with the land. By assignment, this note came to the hands of one Winneford, who sued upon it, after its maturity, and recovered a judgment against Neilson for the amount, and afterwards subjected the land to the satisfaction thereof by bill based upon the vendor's lien. The land was sold subject to the equity of redemption, and bought by Winneford. A few

days before the expiration of the time of redemption, Neilson borrowed from William Harris and Temple Harris, for the express purpose of redeeming the land, $2,500, and all of the money except about $50, not required for the purpose, was so used, the lenders, through their lawyer, seeing to the proper application of the money. To secure this loan, on March 3, 1877, W. R. Neilson and his wife Mary J. Neilson, joined in a conveyance of the land to James P. Evans as trustee, in trust to secure the notes given for the money, and with power of sale in case of default. On March 13, 1877, Bell and Easterly, in compliance with their bond for title, conveyed the land to Neilson and wife by deed in fee. The note to the Harrises not being paid, the trustee, Evans, was proceeding to sell the land under the powers in the trust deed when he was enjoined by the original bill in this cause.

That bill was filed March, 1, 1879, by W. S. Smith, as testamentary trustee for Mary J. Neilson, the wife of W. R. Neilson, and her children, under the will of her father, Wm. Smith, against Neilson and wife, and their children, James P. Evans as trustee, and the two Harrises. The object of the bill was to set up a prior right to the land under the mortgage to Wm. Smith of December 25, 1869. Wm. Smith, as surety for Neilson on the note to Foster, had been compelled to pay the money. Wm. Smith died in 1874, in South Carolina, having first made a last will, which was duly proved and admitted to record in that State. By the sixth clause of his will he

devised and bequeathed to his son, W. S. Smith, the debt upon Neilson, secured by the mortgage, for the use and benefit of his daughter, the wife of Neilson, who was "to have the issues, increase and profits of said land in whatever shape it may assume, for and during her natural life," and at her death it was to descend to her children equally, the child or children of any deceased child or children to take the share which the parent would be entitled to if living. The said W. S. Smith was authorized by the will "as trustee or executor," at some convenient time to foreclose the mortgage, and purchase the land, if it could be done, for the debt, and "hold it subject to the same trusts as are attached to the debt." Or if the land could not be bid in for the debt, and should be sold to other parties, or if Neilson should pay the debt, the trustee was directed to hold the funds subject to the same trusts, or to purchase lands therewith, and hold them subject to the trusts.

W. and T. Harris and Evans answered this bill, and filed their answer as a cross-bill against the other parties to the original bill, claiming priority of satisfaction out of the land, and asking a foreclosure of their trust deed by sale. The chancellor, on final hearing, gave the complainants in the cross-bill the preference claimed by them, and the original complainant, and two of the Neilson children appealed.

A copy of the will of W. Smith was filed in evidence, but the certificate was defective. The complainants in the cross-bill waived all objection to the certificate of authentication, and agreed that the copy of

the will might be read subject to their other objections as to competency. These objections were that the will had never been filed in Greene county, Tennessee, for probate, or proved there; that it had never been recorded or registered in this State, and that no letters testamentary upon it had ever been taken out as required by the Code; and that, consequently, the original complainant could take no title under it to realty situated in this State.

A correct certificate of the authentication of a foreign will should include the probate: *Harris* v. *Anderson*, 9 Hum., 799; *Marr* v. *Gilliam*, 1 Cold., 512. The waiver of objection to the certificate of authentication necessarily implied that the will was proved according to the laws of this State, as required by the Code, sec. 2182. A foreign will so proved is sufficient to pass lands and other estate: Code, sec. 2185. And a copy of such a will duly authenticated in the manner prescribed by the act of Congress is made evidence in this State: Code, secs. 2186, 2188. The copy of the will of Wm. Smith in the record must be, under the waiver of objection, considered as thus authenticated. The will bequeathes the debt secured by the mortgage, and devises the land conveyed for its security to W. S. Smith as trustee, specifying the mode in which each, in certain contingencies, shall be held and used for the benefit of Mary J. Neilson for life, and after her death to go to her children absolutely. If the bill seeks a personal judgment against W. R. Neilson for the debt, which it does not in terms, no defense has been made by Neilson, and

no other person can set up a defense for him which only goes to the remedy. The main object of the bill is to enforce the mortgage by a sale of the land for the satisfaction of the debt. As between the original complainant and Neilson, the right of the former to the relief sought is clear. As between the complainant and the Harrises, in this view of the case, the question is one of priority or superiority of title. And if the statutes require the will to be proved recorded or registered in this State, before it can be recognized by the courts as a muniment of title to realty claimed by a devisee under it, then the objection made by the Harrises is well taken. For the will has never been proved, recorded or registered in this State.

The provisions of the Code, sec. 2182, *et seq.*, which bear upon this point, and of the statute from which they were taken, are, it has been said, somewhat obscure: *Williams* v. *Saunders*, 5 Cold., 60, 68. The obscurity will be to some extent expelled by considering the pre-existing law, and how far it was intended to be changed. It was the settled rule of English law, recognized by our courts as in force in this State, that a devise of land was in the nature of a conveyance and special appointment, passing only the title to the testator at the date of publishing the will: *Brydges* v. *Duchess of Chandos*, 2 Ves., Jr., 427; *Wynne* v. *Wynne*, 2 Swan, 407. There was no provision in England, until recently, for the probate of wills of realty by the probate courts so as to conclude all parties in interest, and it was necessary to establish such a will by proof whenever any ques-

tion occurred in court involving its validity: *Habergham* v. *Vincent*, 2 Ves. Jr., 230. At common law, therefore, a devise of land was good without probate of the will containing it: *Weatherhead* v. *Sewell*, 9 Hum., 272. A foreign will, duly authenticated, might be introduced in evidence as a muniment of title: *Donegan* v. *Taylor*, 6 Hum., 501. It was for this reason that the act of 1784, ch. 10, sec. 6, (Code, secs. 2197, 2200), made the probate of wills and attested copies evidence of the devise of real estate, with leave to any person, upon the suggestion of fraud in the execution of the will, to insist upon the production of the original. The probate of a foreign will of personalty in the forum of the testator's domicil is conclusive on all persons: *Williams* v. *Saunders*, 5 Cold., 60. A foreign will, duly proved, being conclusive as to personalty, and the will itself being evidence as a muniment of title as to realty, the act of 1809, giving foreign executors and administrators the right to sue in this State, in virtue of their letters testamentary or of administration, was in accord with the then existing law, and was never supposed, to be inconsistent with the act of 1823, ch. 31, brought into the Code, sec. 2182, *et seq.* The act of 1809 was repealed by the act of 1840, and it then became necessary to have administration of personal assets in this State. And as a result, it was held that a will executed and probated in another State would not be regarded in this State, so far as the personal assets in this State were concerned, until made effectual as provided by the laws of this State:

Carr v. *Lowe*, 7 Heis., 84. The same reason does not apply to a will of realty, properly probated in a foreign State in the mode required by our laws. Such a will, duly authenticated, may still be used as a muniment of title. The provisions of the Code already cited cover the case.

By the contract of October 22, 1868, between Easterly and Neilson, the latter acquired an equitable right to one-half of the land bought from Hancher, charged with the payment of one-half, the purchase money. He did actually pay $2,965.61 of the purchase money, the greater part of which was borrowed from Foster upon the suretyship of Wm. Smith. The surety was indemnified by the mortgage of the 25th of December, 1870. That conveyance carried all the interest of Neilson in the land under his contract with Easterly. This interest was formally recognized by Bell and Easterly, after the conveyance of the land to them by Hancher, by their title bond of December 15, 1870, which was for the half of the land set apart to Neilson by agreement. This bond was conditioned for the making of a title upon the payment of the balance of the purchase money due from Neilson for his half of the land, and between three and four hundred dollars of Neilson's personal indebtedness to Bell on other accounts. As between Bell and Easterly and Wm. Smith, the former could only claim priority of satisfaction to the extent of the unpaid purchase money. The mortgage would give a superior right to the mortgagee over Bell for the residue of his debt over the unpaid purchase money.

Bell's debt was paid with the money borrowed from W. and T. Harris. The conveyance of Neilson and wife to Evans in trust to secure this loan, was only a conveyance of the land to which Neilson was entitled under the contract with Easterly, and the title bond of Easterly and Bell. It was taken with full knowledge of the previous mortgage of Smith, under the mistaken belief, superinduced by Neilson, that the mortgage debt had been paid. The debt to Bell was extinguished, and Easterly and Bell, on March 13, 1877, in compliance with the terms of their title bond, made to Neilson and wife a deed in fee to the land. The use of the money borrowed from the Harrises to pay for the land did not give to the lenders the right to be subrogated to the vendor's lien, nor did it create in their favor a resulting trust; *Durant* v. *Davis*, 10 Heis., 522; *Gray* v. *Baird*, 4 Lea, 212. Nor would the principle of subrogation, which is one of equity merely, be applied so as to interfere with prior legal or equitable rights: *Gaskill* v. *Wales*, 36 N. J. Eq., 527. And the equity arising from the fact that the money loaned was used in paying the purchase money is only the same equity which the mortgagee might claim for the like use of his money. No advantage accrues to the Harrises by reason of the fact that the subsequent legal title of Neilson and wife inures to their benefit under the warranty in the trust deed, whereas there is no such warranty in the mortgage deed. For the contest is not between parties having equal equities, in which case the obtaining of the legal title may sometimes give an ad-

vantage of which equity will not deprive the party. For here the rights of the parties are governed by positive statute, the first recorded giving the better right: Code, sec. 2073.

The original complainant is entitled, as trustee, to subject the land to the satisfaction of the mortgage debt, and to be first paid out of the proceeds of sale. But inasmuch as Neilson and wife have been in possession of the land since the death of Wm. Smith, and up to the appointment of a receiver in this case, and the wife has enjoyed the rents, issues and profits, no interest will be calculated on the mortgage debt between these dates. The complainants in the cross-bill will be entitled to the net rents, after deducting the expenses of the receivership, in the hands of the receiver, the rents having been impounded on their motion. They will also be entitled to any surplus proceeds of the sale of the land after satisfying the mortgage debt and the costs of the case. The covenants of the trust conveyance made to secure the debt to W and T. Harris are, of course, not binding on the wife of Neilson, and her interest under the will of her father was in the mortgage debt, not in the land. Her life estate in the fund did not, therefore, pass to the trustee by virtue of the trust conveyance. The entire costs, other than those arising out of the receivership, will be first paid out of the proceeds of the sale of the land.

The decree of the chancellor will be reversed, and a decree entered in accordance with this opinion.

POSTON SOUEY *v.* THE STATE.

1. CRIMINAL LAW. *Defendant entitled to charge applicable to facts of case.* A defendant in a State prosecution has a right, not only to a correct charge of the general principles of law applicable to the defense relied on, but to a specific charge, if requested, of the law applicable to the particular facts of the case.

2. SAME. *Same. Threats.* Where, therefore, upon a trial for murder, the defense being justifiable homicide, it was shown that the deceased was a dangerous man and had threatened on the very day to take the life of the defendant before dark, which threats were communicated to the defendant, and it was further shown that the deceased about dusk went to where the prisoner was and made a demonstration which might reasonably lead the defendant to believe that he intended to carry out his threats, but the proof in one aspect tended to show that he had no such intention, the defendant was entitled, upon request, to a charge that if he honestly believed, upon reasonable grounds, that his life was in danger he would be justified in killing the deceased, whether the deceased went to where the defendant was to execute his threats or not.

FROM CARTER.

Appeal in error from the Circuit Court of Carter county. NEWTON HACKER, J.

R. R. BUTLER and S. G. HEISKELL for Souey.

ATTORNEY-GENERAL LEA for the State.

COOPER, J., delivered the opinion of the court.

The prisoner has appealed in error from a judgment of conviction of voluntary manslaughter committed on the body of one William Springer. The defense relied on was and is that the killing was done under

an honest belief at the time, founded upon a reasonable ground, that it was necessary to take the life of the deceased in order to protect his own life, or save him from great bodily harm, the prisoner himself being in no fault: *Hull* v. *State*, 6 Lea, 249.

The prisoner was a clerk in a commissary store kept to supply hands employed in the construction of a railroad. The deceased came to the vicinity about a week before the killing, seeking employment on the railroad. There is evidence tending to show that he either failed to obtain employment, or employment at such a price as he desired to secure, and that he attributed the failure not to the manager of the work but the prisoner, the clerk. One witness introduced by the State, and another by the defendant prove the fact that on the day of the killing the deceased threw the blame upon the prisoner, accompanying his assertion with the threat that he would kill the prisoner that day. The former witness testifies that he saw the deceased about four o'clock on that day, when he, the witness, was on his way to the commissary store, who then made threats against the prisoner, attributing to him the failure to get work at a satisfactory price, and saying, with an oath and vituperative epithet, that he would kill the prisoner before sun down. Witness told the prisoner of these threats at the store. The witness went afterwards to a blacksmith shop, about 300 yards from the store, where the deceased was at work for the proprietor that day. The deceased again repeated his threats. He stepped out into the road, and talked loud and boisterous, cursing

the while, and swore he would kill defendant before dark. Witness communicated these threats also to the defendant. At four o'clock on the same evening, Mrs. Snyder, who resided with her husband about a mile from the store, rode up to the store, accompanied by her nephew, a youth of not quite 17 years of age. Their horses were hitched by the side of the road, and Mrs. Snyder was taken by the defendant into a side room, where there was a fire, the day being cold and rainy in the latter part of November, and the store being filled with railroad hands who were purchasing supplies, it being Saturday. While these persons were in the house, their horses were carried off about 75 yards into the woods, and there hitched. The same State's witness, whose testimony is given above, says in effect that the deceased took the horses from where they had been hitched, saying that he would pull off the bridles, and maybe the defendant, again using an oath and a vituperative epithet in connection with his name, "would poke his head out and he would get a chance at him." The deceased went also with the witness to his boarding-house, where the defendant boarded, and could not be induced to go to his own boarding-house. He said he would eat supper, and kill defendant. There is also some proof tending to show that the deceased knocked at the door in which Mrs. Snyder was while at the store.

The defendant's witness states that he went to the store between three and four o'clock, and found no person there. He then went to the blacksmith shop and asked deceased if he knew where defendant

was. He replied that he did not, but he intended to find him, and kill him before the sun went down. Witness went back to the store, and, finding defendant there, asked him if he knew the deceased was mad at him, and told him what he had said. The defendant replied that he did not want to have any difficulty with deceased, and would try to keep out of his way.

The blacksmith, who was also introduced as a witness by the State, proves that he had known the deceased for 23 years, but had not seen him before his recent coming to the neighborhood for 12 years. He testifies that the deceased was a dangerous man, a very dangerous man when mad, and that he told defendant in answer to a question by him whether the deceased was much of a fighter, that "when mad he was a devil, yes a legion of devils." The deceased was a powerful man, six feet two inches in height, and weighing about 225 pounds. The defendant was a young man, weighing about 145 pounds.

When it was discovered that the horses of Mrs. Snyder and her nephew had been taken off, the defendant and the nephew went out and found them. About dusk Mrs. Snyder, her nephew and the defendant left the store together, the nephew going for the horses, and the defendant and Mrs. Snyder walked along the public road in the direction of her house. After they had gone about a hundred yards, Mrs. Snyder, who was walking behind the defendant, looked back and saw deceased running down the road towards them, her nephew being a little ahead of him, riding one

horse and leading the other. The deceased was bare headed. He had been drinking freely that day with the blacksmith, who says that he himself was drunk, but remembered all that occurred, and deceased was as drunk, or drunker. At this point the testimony of the aunt and her nephew, the only two persons present when the killing occurred, is somewhat variant.

Mrs. Snyder says that when she saw the deceased coming she moved in front of defendant; that deceased ran against defendant, and came around to her taking her by the shoulder, and said: "I'll put you on your horse." At that time her nephew, she says, was on a line with them on the road. She told deceased that she did not want to get on her horse. He took his hand from her shoulder. She partially turned towards him, and he stepped up in front of her, and said: "I can set you on nice." The defendant then remarked: "You had better mind what you are doing." The deceased stepped back and said: "I'll fix you;" and put his right hand under his coat on his right hip pocket. "I saw his coat part to the top," says the witness. The defendant then put out his pistol, which the witness saw him cock, and fired several shots, four of which took effect. When the deceased stepped up to her the second time, the witness says her nephew was in front of them, having ridden on ahead.

The nephew's statement is that when his aunt stepped in front of the defendant, "the defendant took out his pistol, cocked it and put it under his coat on the right side. I heard the pistol click. Deceased came

up and walked around defendant, and said to Mrs. Snyder, two or three times, I will help you on your horse. She said, I don't want to get on my horse. Deceased stepped back and laughed. Defendant and Mrs. Snyder started on, and went three or four steps. Deceased made one or two steps, and defendant turned around, drew his pistol and shot deceased. I did not see the pistol but heard the report. I saw deceased throw up both hands, and go forward towards defendant. Deceased had nothing in his hands." In another part of his testimony this witness says: "When deceased overtook defendant and Mrs. Snyder, he went to the left of defendant. Defendant did not speak that I heard. I was in ten steps." Again this witness says: "I was riding one horse and leading one. I might have been a little in front, or by their side, or a little behind them. We were all right along together. I was on the right side of the road, and they were on the left. I did not say that I was ten steps in front of them when my aunt looked around, and said yonder comes that man. I don't know whether deceased had on a hat or not. I think he had on a coat. I did not see deceased until he came up to defendant and Mrs. Snyder. If he took hold of her, I did not see him. I did not see him run against defendant. I did not hear defendant say I will put Mrs. Snyder on her horse, or the deceased say, damn you I'll fix you, nor see him put his hand on his pistol. Deceased started in the direction we were going. When I last saw them they might have been touching each other. I don't know how close they were to-

gether. I don't know whether deceased was drunk. It was dark when this happened. I don't know whether it was cloudy or not." The witness adds: "I think that if Springer had said 'damn you I'll fix you,' I was close enough to have heard him. I was looking at the parties at the time."

It does not appear that the deceased was armed. When his clothes were removed after he had been carried to the shop no arms were found. And a witness was allowed to prove, without objection, as a dying declaration of the deceased, after the attending physician told him he would die, that the deceased said: "It was horrible to be shot up that way for nothing."

In view of the animosity proved by two witnesses to have been shown by the deceased to the defendant on the day of the killing, and his repeated threats to take the defendant's life before dark, and the fact that these threats were communicated to the defendant, it seems probable that the jury would have found that the defense of justifiable homicide had been made out if they had believed the testimony of Mrs. Snyder. For her testimony does show such an overt act, coupled with the previous threats, as would have brought the case within the law of self-defense as settled by this court. The jury must therefore have given greater credence to the testimony of the nephew. Even from that testimony the defendant might well have been alarmed, after what he had heard, at finding himself approached by the deceased, bare headed, and running, and might have been justified in preparing for the worst. His testimony, moreover, is that after the de-

fendant and Mrs. Snyder had again started on, the deceased followed them, and was shot while going forward towards the defendant. It otherwise appears that all of the shots took effect in the front part of the deceased, showing that he was facing the defendant. The witness does not undertake to characterize or explain the act of the deceased in stepping forward after the defendant and his companion. It was, however, for the jury to say whether it was such an overt act under the circumstances as would justify the killing, and they have found that it was not.

It is obvious, however, that the facts make out a very close case, and one which required the utmost accuracy in the charge to sustain the verdict. The law of self-defense is laid down by the trial judge in his charge with entire accuracy, for the charge is made up of extracts from the opinions of this court. But, like too many charges of the trial judge, while the charge is abstractly correct, it has no reference to the facts of the particular case. It would apply to any other case of self-defense just as well as to this case. The turning point of this case, looking alone to the testimony of the nephew and the other evidence tending to show that the deceased had no intention at the time of making a personal attack on the defendant, was whether the defendant from his standpoint might not have a reasonable ground to entertain honestly a different belief. The court was asked to make a special charge, upon the facts in evidence, to bring squarely before the jury this material aspect of the case. These requests were:

"If it appears in evidence that the deceased had made threats that he would kill the defendant, or do him great bodily harm, and the threats were communicated to the defendant, and the deceased came to where the defendant was, and, either by acts or words, made any demonstration that would reasonably lead the defendant to believe that the deceased was about to carry the threats into execution, he had the right to take the life of the deceased, whether the deceased intended to carry out the threats or not."

"Or that if the deceased made threats that he would kill the defendant before sun down, or before dark, and that the threats were communicated to the prisoner, and the character of the deceased was that of a dangerous man; and that if the deceased went to where the prisoner was, and made a demonstration that would reasonably lead the defendant to believe that he intended to carry out the threats, the defendant had the right to kill him whether the deceased went to where the defendant was to carry the threats into execution or not."

We think that the parties to a State prosecution as well as the parties in a civil action, have the right not only to a correct charge of the general principles of law applicable to the character of the case, but to a specific charge, if requested, of the law applicable to the particular facts of the case. Under the peculiar circumstances of the present case, the defendant was entitled to a charge upon the point emphasized by his requests, and which was the very turning point of his defense, if not in the language of the requests, and

it need scarcely be said that a demonstration by words would not be within the rule, at any rate in such language as would plainly and squarely present it to the jury. The second request seems to be unexceptionable.

For this error the judgment must be reversed, and the cause remanded for a new trial.

A. FEDERLICHT *et al. v.* J. M. GLASS and WIFE.

1. MARRIED WOMEN. *Agent. Separate estate.* A married woman, in whose name as the owner of a stock of goods a retail business is carried on by the husband as her agent, is not liable personally on notes executed by the husband in her name for new goods, nor is her separate estate bound for the payment of the debt thus created in the absence of a legal contract to that effect.

2. SAME. *Suit upon notes executed for goods. Pleading and practice.* If, upon being sued at law upon such notes, the married woman pleads her coverture, the title to the goods would revert to the vendors, and they could sue for the same in replevin, or by bill in equity to reach the specific goods, or their proceeds if capable of being identified and followed; but the vendor creditors, in the absence of proof of positive fraud on the part of the married woman, have no lien upon, and cannot subject other goods of her separate estate for their demands, nor hold her liable as trustee or otherwise for the value of their goods which may have been lost, destroyed or otherwise disposed of.

FROM HAMILTON.

Appeal from the Chancery Court at Chattanooga.
W. M. BRADFORD, Ch.

DODSON & MOON for complainants.

WHEELER & MARSHALL and W. H. CLIFT for defendants.

COOPER, J., delivered the opinion of the court.

On August 2, 1880, Isaac Hart conveyed to his daughter, the defendant Sarah M. Glass, wife of the defendant, J. M. Glass, a stock of goods, consisting principally of ready-made clothing, in store at Chattanooga, to her sole and separate use, with power to dispose thereof as she might see proper, any property acquired with the proceeds to be for her like sole and separate use. From the execution of this conveyance until November 25, 1881, when the present bill was filed, the defendant, Sarah M. Glass, by her husband, as her agent, or perhaps more accurately, the husband in the name of his wife, and ostensibly as her agent, continued to carry on business at Chattanooga with the goods thus conveyed and other goods bought to supply the place of those sold. The purchases of new stock were made from various Eastern houses, and among others from Federlicht & Sons of Baltimore, and the Star Suspender Company, who are the complainants in this bill. The purchases from the former were made by the husband about April 1, 1881, amounting to $566.86, for which the husband gave a note in his wife's name in the ordinary form of a promissory note, payable at sixty days. On March 12, 1881, the other complainant, the bill says, sold to "J. M. Glass or S. M. Glass" goods to the value

of $77.75. Each of the complainant companies brought a separate suit at law on the debt thus created against the defendant, Sarah M. Glass, but dismissed the same upon the defendant pleading in defense her coverture. The complainants then joined in filing the present bill.

The bill stated the foregoing facts, but was complicated by the assumption of conflicting hypotheses, and by seeking contradictory relief. Its main object was to assert the liability of the husband to the complainants for their respective debts, and to reach the stock of goods on hand by impeaching the conveyance of Hart to his daughter upon the ground that the stock of goods conveyed was in reality the property of the husband, for which no consideration was paid by the wife, and that the business had been subsequently conducted in the name of the wife for the fraudulent purpose of protecting the goods from the creditors of the husband. This aspect of the case has been abandoned, as conceded by the learned counsel of the complainants, for want of proof to charge the husband with the debt, or to establish the alleged fraud.

The case is before us upon the alternative aspect of the liability of the wife to the complainants, and of the property attached, and of the sureties on the replevy bond by reason of such liability. Upon this branch of the case it is clear, and is conceded, that the contracts of sale were repudiated by the wife by the plea of coverture to the actions at law, and that she cannot be charged personally with the debts of the complainants: *Jackson* v. *Rutledge,* 3 Lea, 626, 629. It

is equally clear, and is conceded, that there is nothing in the contracts stipulating for or creating a lien on the wife's separate estate: *Ragsdale* v. *Gossett*, 2 Lea, 729, 736. All that can be claimed, or is claimed for the complainants is that they may, through the equity created by the facts against the wife, subject the goods attached if they can be found, or hold the parties to the replevy bond, other than the wife, liable thereon for the value of the goods attached.

After the principal prayer of the bill, the complainants add: "But if they are mistaken in this, then they charge that the circumstances before stated are such as to make Mrs. Glass a trustee for complainants and persons who sold said goods and other goods under similar circumstances; that the stock of goods so obtained are a trust fund which a court of chancery will take into custody and apply to the payment of the debts contracted in their purchase." The substance of this charge is that upon repudiating the contract of sale by pleading her coverture, the married women would hold the goods as the property of the vendors, and would be required by a court of equity to turn them over to the owners, or the court would take the goods into custody and apply them, or their proceeds, to the payment of the debts contracted in their purchase. We think this is undoubtedly good law. The contract of sale being invalid or repudiated the title to the goods would be in the vendors respectively, and they might bring replevin or file a bill in equity for their recovery. Chancery would compel the return of the property if in the

possession or under the control of the *feme.* The law has been so declared in the case of an infant who had pleaded his infancy in defense of a bill filed to recover the price of personal property: *Nichol* v. *Steger*, 6 Lea, 393, affirming same case, 2 Tenn. Ch., 328. The same law would be equally applicable in the case of a married woman. If, therefore, the complainants had sought by this bill to reach their goods, and had attached them, their equity would have been clear. And, under the present bill, if the property attached, which is now the only property subject to be reached by the decree, had been the goods of the complainants, or either of them, there would have been no difficulty in administering relief *pro tanto.* Unfortunately for the complainants, there is not a particle of proof in the record to show that any of the goods of the complainants were levied on by the attachment, or were in the possession or under the control of the defendants, or either of them. On the contrary, it distinctly appears that the articles levied on consisted of ready-made clothing of a particular description, and that the articles alleged to have been sold by the complainants were of an entirely different description. No relief can therefore be granted on this ground.

The chancellor, going beyond the bill, holds that the wife, by disaffirming the contracts of sale, "thereby made herself liable as trustee to account for the value of said goods." He thereupon gives a nominal decree against the defendant, Sarah M. Glass, in favor of each complainant company for its debt, the execution to be only levied "on the stock of

goods attached, if they can be found." He then renders a decree against her, her husband and a surety on the replevy bond, for the penalty of the bond, to be satisfied by the payment of complainants' debts. The execution on this decree is to run generally against the last two parties, but as to the married woman is only to be levied on the property attached, if found. He does not, it will be noticed, give any personal judgment against the married woman at all, nor declare any lien in favor of complainants on her separate estate, and yet subjects her separate estate, other than the goods of the complainants, to the complainants' debts. A woman's separate estate cannot, however, be subjected to her debts unless expressly charged upon it by her in the mode prescribed by law. But here, as we have seen, there is no charge on the separate estate by contract, nor *a fortiori* by the invalidity or rescission of that contract. And the property attached, as we have also seen, was no part of the goods of the complainants. The property attached could not therefore be reached by the complainants as their property, for it was not theirs, nor as the separate property of the *feme*, for they had no lien on such property.

The replevy bond in this case was signed by the wife, the husband, and a third person as surety. It is in the penalty of double the amount of the debts of the complainants, and conditioned for the payment of "whatever debt, interests and costs may be decreed or adjudged against the defendant, or either of them, in said suit." No decree can be rendered against

either of the defendants for any debt and interest, for neither is bound therefor, nor against the wife for the enforcement of a lien on her separate estate, for there is no such lien. To the extent of debt and interest there has, consequently, been no breach of the bond.

The Referees report in favor of affirming the chancellor's decree "upon the inherent equities of the case as they present themselves to us through the facts." And it must be admitted that the facts do present a case which appeals strongly to a court of equity for relief, if any relief can be granted consistently with the settled rules of law. Some relief was possible, as we have seen, upon a different frame of bill, or different proof. But the only relief which can be given as the case now stands is upon the liability of the wife, and against the other parties through her. But she is in no event personally liable, and the complainants have no lien on her separate estate, and no claim on the specific property attached. There can be, therefore, no decree at all against the *feme* either personally or to subject property under the control of the court, and consequently no decree against the other parties to the replevy bond.

The real equity of the complainants was to recover their property, or its proceeds distinctly identified or followed. The authorities would probably hold the *feme* liable to this extent: *Jackson* v. *Rutledge*, 3 Lea, 626, 631. The equity claimed is that the defendant, Sarah, became liable for the value of complainants' goods by failing to return them, not personally, but

so far as to charge her separate estate therewith. The only possible ground upon which such a charge can rest would be benefit to the separate estate. But benefit alone to the estate, all our authorities agree, is not sufficient to charge it: *Hughes* v. *Peters*, 1 Cold., 68; *Knott* v. *Carpenter*, 3 Head, 542; *Holder* v. *Crump*, 10 Lea, 320; *Chatterton* v. *Young*, 2 Tenn. Ch., 768, 772. Besides, there is no proof in this case of any benefit. The property may have been destroyed or lost. We have held that an infant, when he pleads his infancy as a defense to a bill to recover the purchase price of personalty, is not liable for the value of the property not returned, and this for the obvious reason that otherwise infancy would be no protection at all. For he would be liable for the value either in contract or tort: *Nichol* v. *Steger*, 6 Lea, 393. The rule is equally applicable to a married woman, if, under the settled law of the State, coverture is allowed to be a protection.

Of course, the power of a court of chancery to compel a married woman to do equity when she is seeking its aid to recover property, or is otherwise seeking to enforce a legal right against a clear equity, stands upon a different principle: *Aiken* v. *Suttle*, 4 Lea, 103; *Pilcher* v. *Smith*, 2 Head, 208. And so probably if a married woman were shown to have been guilty of positive fraud in the particular case: *McFerrin* v. *Carter* 3 Baxt., 335.

The exception to the report of the Referees will be sustained, the decree of the chancellor reversed, and the bill dismissed with costs.

O. T. GALE *v.* THE STATE.

CRIMINAL LAW. *Breaking into house with intent to commit a felony.* If two persons break into a house, one with intent to commit a felony and another with an innocent purpose, the party having the intent to commit a felony is guilty without reference to the secret purpose which the other party may have had.

FROM ANDERSON.

Appeal in error from the Circuit Court of Anderson County. D. K. YOUNG, J.

J. C. J. WILLIAMS for Gale.

WALTER M. COCKE for the State.

COOKE, J., delivered the opinion of the court.

The defendant was convicted of house-breaking under the act of 1871, new Code, section 5438. The proof amply sustains the verdict. Upon his trial below he relied upon the defense of insanity. The court charged the jury, among other things not excepted to, that the question of the sanity or insanity of the defendant is one of fact to be determined by them, which they would do from all the facts and circumstances of the case. If they should be of opinion from the proof, that at the time the offense was committed, the defendant had sufficient capacity to know right from wrong, and that he had enough of reason to know that what he was doing was wrong, he would be responsible.

But on the other hand if they found from the proof, that at the time the offense was committed, the defendant by reason of the absence of intellect or impaired or diseased intellect, did not have sufficient capacity to know right from wrong and did not have enough of reason to know that what he was doing was wrong, he would not be responsible, and they ought to acquit him. That they would, in the light of their common sense, look at all the facts and circumstances bearing upon the mental condition of the defendant, and when they had done so if they had any reasonable doubt as to whether the defendant, at the time of the commission of the offense with which he was charged, had sufficient capacity to enable him to know right from wrong, they ought to acquit him.

The charge upon this subject we think was substantially correct: *Stewart* v. *The State*, 1 Baxt., 178. There were several specific instructions upon this subject requested by the defendant which we deem it unnecessary to notice further than to say that none of them were correct, except as to such portions of them as are contained in the original charge, and it was not error in the court to refuse them in the form in which they were presented.

It was shown by the proof that another person was present with the defendant engaged in the breaking who had no intention of committing a felony, but this want of intention upon the part of the other person was unknown to the defendant, whose object was to rob the safe in the house of money which it was supposed to contain. The court instructed the jury

upon this subject: "That if the defendant was there for an innocent purpose he would not be guilty, but if he was there for the purpose of breaking and entering, and with the intent of committiug a felony after he got in, he would be guilty."

This was correct. All parties present, aiding and abetting, etc., are principals, and the purpose or intent of the defendant in breaking and entering the house would determine the guilt as to him, without reference to the secret purpose which the other party may have had.

We see no error in the record and the judgment must be affirmed.

13L 491
14L 154

MINERVA JACKSON *v.* NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY.

RAILROADS. *Damages.* Damages sustained in driving a cart across the track of a railroad at a dangerous place, by the driver being thrown from the cart by its toppling motion, are not the proximate result of an obstruction by the railroad company of the public crossing by a standing train of cars, for which an action will lie against the company.

FROM MARION.

Appeal in error from the Criminal Court of Marion county. D. C. TREWHITT, J.

W. C. DONALDSON for Jackson.

FOSTER V. BROWN and W. D. SPEARS for Railroad Company.

COOPER, J., delivered the opinion of the court.

The circuit judge sustained a demurrer to the declaration in this case, and the Referees report that his judgment should be reversed. The defendant excepts.

The action is brought to recover damages for injuries to the plaintiff's husband resulting in his death. The declaration avers that the defendant's branch road passes through the town of Victoria, in Marion county, having a depot on its South side for the accommodation of passengers and the receipt of their baggage and freight; that the business part of the town and the residence of plaintiff's husband were on the North side of the railroad; that there was only one public crossing or way over the railroad for reaching the depot from the North side, which was made and provided by the defendant for the public to travel on and over; that on the evening before the injury to the plaintiff's husband resulting in his death, the defendant left a train of cars standing on their track across the way aforesaid, and, although notified that evening by the deceased that he wished to cross the road the next morning, failed to remove the same; that on the next morning the plaintiff's husband drove his cart, in which was the trunk of a traveler intending to take passage on the defendant's train that morning, along the public way across the railroad to carry the trunk to the depot; that by reason of the obstruction of the

way by the defendant's standing train plaintiff's husband was compelled, in order to reach the depot with his cart, to cross the railroad track where no crossing was made or provided by the company, and where the track was about twelve inches high from the ground to the top of the rail, and while so crossing he was, by the jostling and toppling of the cart, thrown under the wheels of the cart, receiving injuries from the effect of which he died.

The question raised by the defendant's demurrer to the declaration is whether the obstruction by the defendant of the cross-way, which is charged to have been "wilfully, carelessly, wrongfully, unlawfully and negligently" done, was the proximate cause of the injury to the plaintiff's husband so as to render the defendant liable therefor in damages. The right of the public to the highway crossing for the purpose of travel is so far paramount to the right and convenience of the company for any other purpose than that of transit by its running trains, that the obstruction as stated in the declaration was clearly negligent and unlawful: *State* v. *Morris, etc., Railroad Company,* 25 N. J. L., 437. The defendant was therefore liable in damages to any person, having a right to cross its road at that point who was prevented from so doing by the obstruction. And the only question is whether the injury sued for was so far a proximate result of the obstruction as to render the defendant liable therefor because of the obstruction. The declaration does not aver or state any fact of negligence or wrong on the part of the defendant connecting it with the

injury except the creation of the obstruction to the public way by the standing train of cars.

A long series of judicial decisions has defined proximate, or immediate and direct damages to be the ordinary and natural results of the negligence, such as are usual and might therefore have been expected; and this includes in the category of remote damages such as are the result of an accidental or unusual combination of circumstances which would not be reasonably anticipated, and over which the negligent party has no control: 2 Thomp. Neg., 1083, citing the authorities. A proximate cause is therefore a probable cause, and a remote cause an improbable cause. A wrong-doer, in other words, is answerable for all the ordinary and natural consequences of his wrong but no further. The difficulty is in applying the general rule to the facts of a particular case.

It is very clear that a railroad company would not be liable for an injury to a person who undertook to drive a cart across its track at any other place than a regular crossing, and was thrown from the cart by its jolting over the rails. The track is the property of the railroad company, not intended to be crossed by other vehicles except at the ways provided for the purpose, and a third person who undertook to pass it elsewhere would be a mere trespasser. Such a person would act at his peril, the company being in no way responsible for any accident resulting from the attempt. The only possible ground to take this case out of the general rule is that the wrongful obstruction of the highway justified the plaintiff's

husband in adopting an unlawful and dangerous route to reach the depot, and made the defendant liable for the consequences. And this is the position assumed by counsel, the argument being that the traveler has a right to reach his destination, and adopt the best mode which seems open to him, the question whether he was justified in so doing being one for the jury. But it is difficult to see how because one party has done an unlawful act, the other party can be justified in doing an equally unlawful act at the risk of the former. And the authorities are all in conflict with the contention. It seems to be well settled that if a traveler is compelled to leave the highway by reason of a defect therein rendering it impassible, and while so off the highway, and attempting with due care to pass the obstacle, receives an injury he cannot recover damages of the town, although he could have done so if the injury had happened to him on the highway; for the negligence of the town is to be deemed a remote cause of the injury: 2 Thomp. Neg., 1092. It was so held when the traveler, going off the highway to shun an obstruction not otherwise passable, foundered in a pond: *Tisdale* v. *Norton*, 8 Metc., 388. And when a bridge having been washed away and not rebuilt, the traveler attempted to cross at a ford not in the dedicated highway, the river being swollen: *Hyde* v. *Jamaica*, 27 Vt., 443, 458. The mere fact that a bridge is impassable will not justify a traveler in attempting to ford the stream under circumstances of danger. Damages accruing from this source are not

the proximate consequences of a failure to keep the bridge in repair: *Day* v. *Crossman*, 1 Hun., 570; 4 N. Y., S. C., 122; *Jackson* v. *Greene County*, 76 N. C., 282; *Farnum* v. *Concord*, 2 N. H., 392.

The exception to the report of the Referees will be allowed, and the judgment of the circuit court, sustaining the demurrer to the declaration, affirmed.

W. G. HUME *et al. v.* COMMERCIAL BANK *et al.*

ATTORNEY'S FEE. Counsel, who file and prosecute a bill in the name of certain creditors of an insolvent corporation, on behalf of all creditors, to hold the officers and alleged officers personally liable for any deficiency of assets over the assets assigned in trust for the creditors, and to this end incidentally for an account, settlement and disbursement of the trust assets, whose services are confined to the main purpose of the bill under which nothing is realized, cannot charge their compensation on the trust fund.

FROM KNOX.

Appeal from the Chancery Court at Knoxville. W. B. STALEY, Ch.

CORNICK & CORNICK for complainants.

JAMES COMFORT, A. S. PROSSER and W. P. WASHBURN for defendants.

COOPER, J., delivered the opinion of the court.

The only question presented in this record is whether

the counsel of the complainants are entitled to have their compensation for professional services in the cause charged upon the general trust fund in the hands of the trustee who is a defendant, it being conceded that the compensation was a proper charge upon any recovery had under and by virtue of the bill and the services rendered? The question was decided from the bench, the court being of opinion that the compensation claimed was not chargeable on the general trust assets, and that nothing had been realized under the bill. A petition for rehearing has been filed, in which it is insisted as matter of fact that the object of the bill was partially attained, and some money realized under it, the services of the counsel being recognized by the trustee and defendant creditors.

The hill was filed by half a dozen creditors of the Commercial Bank of Knoxville, for the benefit of themselves and all other creditors, to hold the stockholders and directors of the bank individually liable for a sum sufficient, over and above the assets of the bank which had been conveyed in trust for its creditors, to pay all of the liabilities of the bank. To this end all necessary accounts between the trustee, the creditors and the bank were asked to be taken, and the assets disbursed under the order of the court. The trustee filed a cross-bill against the other defendants and all creditors of the bank for a like purpose, for an adjustment of disputed debts, and the settlement of the trust under the orders of the court. The original and cross-bill were carried on, so far as the holding of the stockholders and directors liable was concerned, *pari*

passu, the complainants' counsel taking the burden of the battle, but aided by the trustee and his counsel. The settlement of the trust matters was exclusively attended to by the trustee and his counsel. The trustee, whose deposition is the only one taken on this subject, testifies to these facts. He disproves any retainer by him, either express or implied, of the complainants' counsel for any purpose, and there is no proof to the contrary. The bill was dismissed so far as it sought to hold the directors, or certain persons who were held out as directors, individually liable: *Hume* v. *Bank*, 9 Lea, 728. The president and cashier of the bank made no defense, and were held liable by decree for the whole amount of assets misappropriated and the debts of the bank. The decree was rendered in favor of the trustee.

The principal object of the bill was to hold the so-called directors individually liable for the debts of the bank under the charter, and for funds misappropriated by the officers of the bank on the ground of neglect of duty. The only testimony taken under the order of referenee before us tends to limit the services of the complainants' counsel to this branch of the case. The services were valuable and well worth the amount reported by the clerk. *Prima facie*, however, the counsel must look for their compensation for their services to the complainants who employed them, or came in and made themselves parties to the bill, or to the fund realized.

It is said in the petition for rehearing that the bill was filed for the purpose of winding up the affairs of

the bank in behalf of the creditors. And there is a prayer that all the creditors be required to make themselves parties and prove their claims, and that the assets of the bank in the hands of the trustee be ascertained, collected and disbursed under the orders of the court. But if in fact the creditors made themselves parties defendant, and filed their claims by independent counsel, the complainants' counsel could only look to their clients for compensation. The bill does not show that the trustee was neglecting his duty, or the trust funds in any danger making a bill to impound the assets necessary. And it is very clear that the settlement of the trust was only an incident to the real object of the bill, and, as we have seen, so much of the case as related to the trust was in fact attended to by the trustee and his counsel. The case is utterly unlike the case of *Moses* v. *Ocoee Bank*, 1 Lea, 398.

It is also said in the petition for rehearing, that the actual amount collected under the bill was $25,000, and the recovery under that feature of the bill which sought to hold the stockholders individually liable was about $2,400. But the record shows that the first of these sums simply refers to the moneys realized by the trustee under the trust deed, in the realization of which this bill cut no figure. The record further shows that the latter sum was realized by the trustee under an independent bill. No assets whatever are shown to have in fact been realized under this bill. The trust funds have merely been ascertained and disbursed. But as to that part of the

case the trustee and his counsel represented the one side, and the creditors with their several counsel the other side. The services of the complainants' counsel in this behalf have only been like the services of each of the other counsel of the creditors. In such a case, each counsel must look to his clients for compensation. See matter of *Attorney-General* v. *North American Insurance Company*, 91 N. Y., 57.

Petition disallowed.

THE STATE, for use, etc., *v.* CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY.

TAXES, HIGHWAY. *Railroads.* Railroads are liable for highway taxes assessed upon the value of the roads as returned by the commissioners; whether the proper distribution of the taxes among the road districts is made by the clerk of the county court is a matter for the districts and not for the railroad tax-payer on a contest of payment.

FROM HAMILTON.

Appeal in error from the Circuit Court of Hamilton County. D. C. TREWHITT, J.

CLIFT & BATES for the State.

DEWITT & SHEPHERD for Railroad Company.

FREEMAN, J., delivered the opinion of the court.

This is an agreed case, presenting the question

"whether or not the assessment of a highway tax for the year 1882, by the county of Hamilton is valid," under the facts stated in the record.

After the passage of the act of 1882, chapter 16, the property of defendant was regularly assessed by the Railroad Commissioners and the value for taxable purposes situated in Hamilton county certified to the county court clerk as the act required.

The county court of Hamilton county had previously, under the provisions of the road law of 1881, laid a tax of ten cents on the hundred dollars on property for highway purposes. The assessment made by the Commissioners showed this road to be liable for taxes on $595,556 of distributable property outside of the corporation of Chattanooga, on which a tax was extended on the books of the county for highway purposes of $595.50, being at the rate of ten cents on the hundred dollars, as levied by the county court.

This sum is the proper amount if the company is liable to a highway tax at all under the present laws of the State. It is conceded, however, that no such tax can be laid, because it is assumed that the tax under the act of 1881 (the Road Law), is to be laid on the property of each road district provided for in that act for road purposes in that district, and that there is no provision in the act of 1882 for thus subdividing the taxes laid on railroads.

It appears that after entering the proper amount of tax as fixed by the county court, the judge of the county court apportioned the sum so levied between six districts through which the road ran, as we take it,

giving to each the sum of $99.25, and this sum has been placed in the hands of the constables in the respective districts for collection.

By the fifth section of act of 1881, it is provided: "That the tax for highways shall be not less than two nor more than fifteen cents on each hundred dollars of taxable property, as shown by the county assessment, all taxes assessed under this act and collected as hereinafter provided, shall be *used* for maintaining the highways and bridges in the road districts in which the assessment is made."

By the third section of the act the county court of each county is required at January term of the quarterly court to "assess the tax for highway purposes."

By section —— "the clerk of the county court is required within thirty days after the assessment of the highway tax for 1881, and by the first of March thereafter to prepare for each district a complete assessment of the highway tax for his district for that year, specifying the amount each tax-payer may pay in work, and the amount to be collected in money, and shall take district clerk's receipt for the same when delivered."

From these provisions it is seen that after the amount of the tax is laid by the county court and property assessed, and that assessment returned to the county court clerk's office then for purposes of collection, the amount thus assessed on property in each road district is to be turned over to the district clerk, provided for by the act for collection.

It is shown in the agreed case that the defendant's road is only 1 mile long in the fifth district; the one

now in controversy is 5¼ miles in the second district; in the first district 5¾; in the twelfth 7; ⅛ in the eleventh, and 5 in the sixth.

It is earnestly argued, that because of this inequality of the apportionment of the amount levied as between the districts, the same cannot be collected.

We take this is a matter with which the railway tax-payer has nothing to do when the matter of payment is in contest. The true amount is assessed by the Commissioners and levied by the county court; no more than this sum can be collected. But whether it is properly apportioned among the districts is a matter of county administration of its funds, and if improperly administered the districts or tax-payers may, probably, apply to the county court to have the distribution corrected, and the court might be bound to expend it. But in the district the matter of collection, so far as the railroad is concerned is directory, or at any rate a matter that does it no injury whatever, as it is only assessed on the amount certified by the State Commissioners. When this is done it is of no interest to the company whether it is collected for the benefit of one district or another.

The collection by the district officer is only for convenience of appropriation to the roads of that district. The matter that concerns the railroad is, that no more property shall be assessed than has been fixed by the State Commissioners, and the rate shall be equal and uniform with other property for like purposes. In other words there shall be no unjust discrimination between the railroad and other tax-payers.

It certainly cannot be maintained that this tax is not levied for a county purpose, and the road liable for it. The true amount and no more having been levied, the road can in no way be injured, whether this sum be apportioned accurately between the districts. It cannot be allowed to pay no tax because of such unequal distribution. Its property of any kind assessed under the act of 1882 is as much within the county for purposes of a highway tax as for any other purpose of taxation.

The judgment will be reversed and judgment here in accord with this opinion with costs.

J. P. IMBODEN *v.* C. T. PERRIE and WIFE.

ATTACHMENT. *Check. Priority.* J. D. I. was indebted by judgment to P. and to J. P. I. Having a fund in bank he gave a check, May 27, on the bank to J. P. I., on same day P. commenced attachment suit against J. D. I. and the attachment was levied by garnishing the bank before the check was presented. *Held*, that P. was entitled to the fund. A check is a mere request to pay the bearer or the order of the payee. Until presented and accepted it is inchoate and vests no title or interest in the payee to the fund.

FROM SULLIVAN.

Appeal in error from the Circuit Court of Sullivan county. N. HACKER, J.

N. M. TAYLOR for Imboden.

THOMAS CURTIN, A. H. BLANCHARD and BAILEY & MCCROSKEY for Perrie.

TURNEY, J., delivered the opinion of the court.

J. D. Imboden is indebted to Mrs. Perrie by judgment in the sum of $1,000. He is also indebted to J. P. Imboden in the sum of $1,500. On May 27, 1882, J. D. had in the National Bank at Bristol about $1,000, and on that day transmitted by mail to J. P. Imboden the following check:

"No. 41. BRISTOL, TENNESSEE, May 27, 1882.
Bank of Bristol—Pay to J. P. Imboden, or order, seven hundred and fifty dollars ($750). J. D. IMBODEN."

On the same day Mrs. Perrie commenced an attachment suit against J. D. Imboden, and on June 1st the attachment was levied by garnishing the bank. J. P. Imboden presented his check on June 6th, and payment was refused because of the attachment. The case was tried in the circuit court without a jury and judgment rendered for Mrs. Perrie. J. P. Imboden has appealed.

The question presented is very much as said by Commissioner Kirkpatrick, "involved in conflict. Two wholly opposite views have been maintained by judges and text writers with so much bearing and force of reason, that to follow either is to satisfy the mind that the one pursued is right." We, however, differ in conclusion from the Referees, and think the sounder rule and weight of authority as well as reason, are with the holding of the trial judge. In *Attorney-General* v. *Continental Life Insurance Company*, 71 N. Y.,

325, Church, C. J., says: "*Lunt* v. *Bank of North America*, 49 Barb., 221, declares the rule accurately, that checks drawn in the ordinary form, not describing any particular fund or using any words of transfer of the whole or any part of any amount standing to the credit of the drawer, but containing only the usual request, are of the same legal effect as are inland bills of exchange, and do not amount to an assignment of the funds of the drawer in the bank." * *

"This doctrine accords with the relations between the parties. Banks are debtors to their customers for the amount of deposits. A check is a request of the customer to pay the whole or a portion of such indebtedness to the bearer or to the order of the payee. Until presented and accepted it is inchoate, it vests no title or interest, legal or equitable, in the payee to the fund. Before acceptance the drawer may withdraw his deposit; the bank owes no duty to the holder of a check until it is presented for payment."

"Knowledge that checks have been drawn does not render it obligatory upon the bank to retain the deposit to meet them. These rules are indispensable to the safe transaction of commercial business. Any other rule would produce confusion and involve banking institutions, and all depositories of moneys in responsibilities to conflicting claimants, which while producing great embarrassments, would serve no beneficial purpose."

In *Bank of The Republic* v. *Millard*, 10 Wallace, 157, Mr. Justice Davis said: "The right of the depositor as was said by an eminent judge, is a chose in action, and his check does not transfer the debt or

give a lien upon it to a third person without the assent of the depository. This is a well established principle of law, and is sustained by the English and American decisions." To the same effect are *Cain* v. *National Security Bank*, 107 Mass., 45, and *Ætna National Bank* v. *Fourth National Bank of New York*, 46 N. Y., 82.

While we are referred to respectable authorities sustaining the opposite view of the question, we are of opinion the authorities cited are more in accord with public policy and the commercial welfare of the country, and adopt them as enunciating the right rule of law in this State.

The exceptions are sustained and judgment affirmed.

L. PAYNE *v.* THE WESTERN & ATLANTIC RAILROAD COMPANY *et al.*

1. CORPORATION. *Tort of agent.* Corporations are liable for the tortious acts of agents in the interest of the corporation, and in pursuance of general or special authority, if within the apparent scope of corporate powers.

2. LIBEL AND SLANDER. The mere posting of a notice by an employer to employes, maliciously forbidding them to trade with a certain person therein named, does not constitute slander or libel.

3. ACTION. *Lawful act.* It is not unlawful for a railroad company to discharge, nor to publish notice that it will discharge hands for trading with a certain merchant, unless thereby a contract between the company and employes is broken; even then no action lies to the merchant unless the notice be libelous.

4. SAME. "Threats and intimidation" in a legal sense, import not merely an evil, but an unlawful act about to be done.

5. ACTION. *Malice.* No action lies to the merchant against the company or another for such notice, though it be posted maliciously and operate to deter employes of the company and others from trading with him and thus ruin his business. An act not unlawful, done in a manner not unlawful, though from wicked and malicious motives, and causing injury, is not actionable.

FROM HAMILTON.

Appeal in error from the Circuit Court of Hamilton county. D. C. TREWHITT J.

ELDER & WHITE for Payne.

COOKE & COOKE for Railroad Company.

INGERSOLL, Sp. J., delivered the opinion of the court.

The question in this case is as to the sufficiency of the declaration. The circuit judge sustained the demurrer and dismissed the suit. The Referees recommend reversal of the judgment. The suit is against a railroad company and its general agent, and the declaration of plaintiff is as follows:

"That, on the 16th day of February, 1883, and for many years previous thereto and continually since, plaintiff has been engaged in business as a merchant in Chattanooga, Tennessee, and operating a store on Market street at and near the depot, car-shed, railroad track and yard of the defendant, the Western & Atlantic Railroad Company. Plaintiff has at all times sustained a good character; and by close attention to business, and honest and fair dealing plaintiff had, on the 16th of February, 1883, built up and

fully established a large, extensive and profitable business; the defendant, the Western & Atlantic Railroad Company, is a large and wealthy corporation, operating and controlling a line of railroad leading from Chattanooga, Tennessee, to Atlanta, Georgia. That said corporation employs a very large number of hands both in and out of Chattanooga; there are also four other railroads coming into Chattanooga, all intimately associated with the defendant railroad company in business relations. Plaintiff's store is located nearly in the center of five railroad *termini* leading into the city. Plaintiff had built up and was enjoying, on the day and year aforesaid, a large, extentensive and profitable business with the employes of all the aforesaid railroads; especially was he selling many goods to and doing a large business with the agents and employes of the defendant railroad company both in Chattanooga and along the line of said railroad; he had also built up a large trade along the line of said railroad, both buying and selling goods to persons living along the line of said road, other than employes. The defendant, J. C. Anderson, is the general agent of the defendant railroad company at Chattanooga, having in charge and controlling the employes in Chattanooga, Boyce Station and elsewhere along the line of said railroad. And the said plaintiff further declares that, while so engaged in his legitimate and profitable business * * * * the said defendants wickedly, unlawfully, fraudulently and maliciously conspired and confederated together out of malice, ill-will and wicked feeling to break up, injure,

damage and ruin plaintiff in his business; and, to that end and for that purpose, they, the said defendants, on the day and year aforesaid, did make, publish and circulate the following scandalous and injurious order, threat, command and paper writing, to-wit:

FEBRUARY, 16, 1883.

J. T. Robinson, Y. M.—Any employe of this company on Chattanooga pay-roll who trades with L. Payne from this date will be discharged. Notify all in your department. J. C. ANDERSON, Agent.

The said J. T. Robinson is and was yard-master in the employ of the defendant railroad company, controlling and having under him a large number of hands. Like orders and commands were addressed and sent to other heads of departments of said railroad; and the same were posted and published by defendants and read and commented upon all along the line of said railroad among and by plaintiff's patrons and customers. Plaintiff further declares that, by reason of said order and command, and other means used by defendants he was brought into reproach, disrepute, suspicion and distrust, and his business broken up and ruined. The employes of the defendant railroad company deterred and intimidated by the threat contained in said illegal command and order, quit trading with plaintiff because of the illegal and malicious interference, threats and combination of defendants, and his business far and near has been greatly damaged and ruined, to his damage," etc.

In the second count the plaintiff, setting forth, as in the first, his lawful and lucrative business and good character and repute as a merchant, and the power, wealth and influence of the railroad company and its

employment of many persons, who traded with him, but omitting any averment of Anderson's agency, complains, that "the defendants unlawfully, wickedly, wantonly, maliciously and out of their malice towards him, the plaintiff, undertook by means of threats, insinuation, innuendoes, slander and other means to oppress, injure, damage and ruin plaintiff in his legitimate business and destroy his character; and by the means and for the purpose aforesaid, and, with said wicked motive, did oppress, injure, damage and ruin plaintiff's business, character and reputation; that the said defendants threatened, among other things, to discharge any of the employes of said railroad company who should trade with plaintiff, and this was published far and near by defendants, whereby not only said employes were deterred from trading with him, but he was brought into reproach, disrepute and suspicion, and lost his other trade and custom," etc.

The difference between the two counts is: First: In the first Anderson is described as the Company's agent; and in the second he is not. Second: In the first the posted notice is set out *ipsissimis verbis;* while in the second its publication and purport are alleged in general terms.

The demurrer of defendants contains the following grounds of objection to the declaration:

First: Defendants had the right to discharge employes because they traded with plaintiff, or for any other cause.

Second: If they had no such right, the act was merely a breach of the contract of employment for which plaintiff had no right of action.

Third: Plaintiff had no vested right in the trade of defendauts' employes; wherefore they had the right to prefer employment by defendants to trading with plaintiff, and consequently to withdraw their trade from him, and he could not sue defendants therefor.

Fourth: The order complained of was not libelous in itself, nor is it made so by *innuendo*, nor is there any matter alleged which is actionable.

Fifth: The railroad company demurs, because it could not be liable for the unauthorized wrongful act of its agent, Anderson, not within the line of his duty.

Sixth: Anderson had a right to hire and discharge employes without direction from any one, and for any wrong done defendants would be liable only to the employes so discharged.

The only distinctive feature of the last ground of demurrer seems to be the assertion of Anderson's right to hire and discharge employes without direction from the railroad company, the latter part, asserting the limitation of liability to the employe for wrong done, being embraced in a former head of demurrer. The peculiar ground relied on in this head is obnoxious to the objection that it is a speaking demurrer, for in the second count of declaration it does not appear that Anderson was even the agent of the railroad company; and in the first, though the agency is alleged, it does not appear that he possessed the extent of authority asserted for him in the demurrer. Wherein it is peculiar, therefore, this ground of demurrer is not well taken.

The fifth ground above set forth is untenable as

to the second count, because of the absence therefrom of any allegation of the agency of Anderson; and as to the first count, because first, instead of wanting in an averment of the authority of Anderson as agent of the company, it alleges expressly a combination and conspiracy between principal and agent to do the alleged wrong to plaintiff, and a participation by both in the act complained of; and second, corporations are liable for the tortious acts of its agents within the apparent scope of corporate powers, which are done in the interest of the corporation and in pursuance of any general or special authority: Cooley on Torts, 119, 120.

The objection to the declaration as one for libel or slander is well taken. The published order set out in the first count not only contains no libelous statement, but it has in it no reference even, direct or indirect, to the *character* of plaintiff. There is no *innuendo* in the count, and it is not easy to see what statements or references therein contained would support one, and this may explain its absence. Let it suffice, that no libel or slander is made out directly or by imputation even, in the count which sets out the writing. The second count bears no resemblance to a declaration in libel or slander. It sets out no writing or spoken words even, but merely contains a general charge that defendants undertook by means of "insinuations, innuendos, slander and other means to oppress, injure," etc. Malice is freely charged, and the charge is frequently repeated in both counts. But there is no suggestion even of any *false* statement,

written or spoken by defendants or either of them. Without this, of course, no action for libel or slander can be maintained; for no amount of malice will compensate for the absence of falsehood in the legal requirements of this kind of action. The suit is not maintainable, therefore, as an action of libel or slander, either to personal character or business reputation. It must stand, if at all, upon the alleged malicious and unlawful conspiracy and combination, and wicked conduct of defendants, for the purpose and with the effect to deprive plaintiff of his customers, and thus oppress, injure and ruin him in his trade.

This, rather than libel or slander, is the particular wrong and injury specially relied on by plaintiff. As concisely put in argument by his counsel:

"We have brought a suit to recover damages because defendants, by threats and intimidations, prevented people from trading at our store."

The full scope of his argument is:

"The declaration sets up, that plaintiff was pursuing a lawful business—that of a merchant; and that defendants, out of malice and ill-will toward him, entered into an unlawful confederation and conspiracy to break him up; and that pursuant to such unlawful purpose, by means of threats, force and intimidation, they drove his customers from him and succeeded in breaking up his business."

"Lawful competition is allowed, but not a conspiracy forcibly and by threats and intimidation to interfere with another's legitimate business."

"The good-will of a business is the subject of ac-

quired right and can be bought and sold as other property."

"Defendants not only maliciously invaded and weakened plaintiff's legal right to the good-will in his business, but by their threats, intimidation and force destroyed this acquired right."

"He, who invades, weakens or destroys a legal right maliciously, is liable in damages therefor."

"Every malicious act is wrongful of itself in the eye of the law; and, if it cause damage or hurt to another, it is a tort, and may be made the foundation of an action."

"When a violent or malicious act is done to a man's occupation, profession or way of getting a livelihood then an action lies in all cases."

The defendants did do a malicious, injurious act to plaintiff's occupation, and hence they are liable."

To this forcible statement of plaintiff's case, defendant's answer in effect is: We have a right to employ, or not employ, when and whom we choose. We may discharge our employes, all or singly, whenever we choose; with or without reason; because they trade with plaintiff or do not trade with him; and, if the employes are injured or wronged thereby, they may sue; but plaintiff cannot. It is purely a matter of contract between the company and its employes; and, if a contract has been broken, only a party to the contract, or one in privity, can sue for its breach. Plaintiff shows no such privity, and therefore cannot maintain this action, unless defendant has done some unlawful act, which caused the injury

complained of; the only act complained of is the notice to hands that they will be discharged if they trade with plaintiff. This, being merely the exercise of an undoubted right by defendant, cannot give plaintiff a right of action, even though the act was maliciously done, and the plaintiff suffered injury therefrom; because malice does not furnish ground for civil action. Wrongful *acts* alone are actionable. And, as to the conspiracy alleged, though it may be actionabe, it does not become so until some wrongful act is done under it; and, since the only act alleged here is not unlawful, but permissible to defendant, this action is not maintainable for conspiracy, for want of the wrongful act done under it; lacking this, the suit must fail, though there be a conspiracy and malice toward the plaintiff, and, in consequence thereof, and of the *lawful* act of defendants thereunder, plaintiff lost his customers and profits, and so failed in his business.

Plaintiff, in reply to this, besides asserting the correctness of his original position, denies that the defendants had the right to discharge or threaten to discharge employes for trading with him, because the concession of such authority and its exercise by strong corporations and large manufacturers would unfairly defeat and destroy competition, and tend to create monopoly in trade; whereas, the law should discourage the latter and foster the former. Plaintiff also insists, that, while our decisions furnish no precedent for his suit, and we have no statute whatever upon the subject, the cases cited by Mr. Addison in the first volume

of his work on Torts, chapter 1, section 1, afford abundant authority for this action.

The novelty, interest and importance of the questions demand a careful examination of the cases and the principles involved. The case turns upon the common law. The first question is: Is it unlawful for one person, or a number of persons in conspiracy, to threaten to discharge employes if they trade with a certain merchant? Would it be unlawful to discharge them for such reason? If not, it surely would not be unlawful to "threaten" it.

If the employes are engaged for fixed terms, it may be assumed that a discharge by the employer for such a reason would be unwarranted, and would give the employe an action for breach of contract. But no one else, except a privy, could complain of the breach of contract, and the ground of the employe's action would be the refusal of the employer to pay him for the period promised in the contract of service. If the service is terminable at the option of either party, it is plain no action would lie even to the employe; for either party may terminate the service, for any cause, good or bad, or without cause, and the other cannot complain in law. Much less could a stranger complain. No action could accrue either to employe or stranger for breach of contract; for no contract is broken. If the act is unlawful it must be on other grounds than breach of contract, as, that it unjustly deprives plaintiff of customers and trade to which his fair dealing entitles him, and thus destroys his business.

For any one to do this without cause is censurable

and unjust. But is it legally wrong? Is it unlawful? May I not refuse to trade with any one? May I not forbid my family to trade with any one? May I not dismiss my domestic servant for dealing, or even visiting, where I forbid? And if my domestic, why not my farm-hand, or my mechanic, or teamster? And, if one of them, then why not all four? And, if all four, why not a hundred or a thousand of them? The principle is not changed or affected by the number. And, if it were, who should say how many it would be lawful and how many unlawful to forbid? Nor can it be better determined by effect than by number. To keep away one customer might not perceptibly affect the merchant's trade; deprived of a hundred of them he might fail in business. On the contrary, my own dealings may be so important that, if I cease to trade with him, he must close his doors. Shall my act in keeping away a hundred of my employes be unlawful, because it breaks up the merchant's business, and yet it be lawful for me to accomplish the same result by withholding my own custom?

Obviously the law can adopt and maintain no such standards for judging human conduct; and men must be left, without interference to buy and sell where they please, and to discharge or retain employes at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act *per se*. It is a right which an employe may exercise in the same way, to the same extent, for the same cause or want of cause as the

employer. He may refuse to work for a man or company, that trades with any obnoxious person, or does other things which he dislikes. He may persuade his fellows, and the employer may lose all his hands and be compelled to close his doors; or he may yield to the demand and withdraw his custom or cease his dealings, and the obnoxious person be thus injured or wrecked in business. Can it be pretented that for this either of the injured parties has a right of action against the employes? Great loss may result, indeed has often resulted from such conduct; but loss alone gives no right of action. Great corporations, strong associations, and wealthy individuals may thus do great mischief and wrong; may make and break merchants at will; may crush out competition, and foster monopolies, and thus greatly injure individuals and the public; but power is inherent in size and strength and wealth; and the law cannot set bound to it, unless it is exercised illegally. Then it is restrained because of its illegality, not because of its quantity or quality. The great and rich and powerful are guaranteed the same liberty and privilege as the poor and weak. All may buy and sell when they choose; they may refuse to employ or dismiss whom they choose, without being thereby guilty of a legal wrong, though it may seriously injure and even ruin others.

Railroad corporations have in this matter the same right enjoyed by manufacturers, merchants, lawyers and farmers. All may dismiss their employes at will, be they many or few, for good cause, for no cause

or even for cause morally wrong, without being thereby guilty of legal wrong. *A fortiori* they may "threaten" to discharge them without thereby doing an illegal act, *per se*. The sufficient and conclusive answer to the many plausible arguments to the contrary, portraying the evil to workmen and to others from the exercise of such authority by the great and strong, is: They have the right to discharge their employes. The law cannot compel them to employ workmen, nor to keep them employed. If they break contracts with workmen they are answerable only to them; if in the act of discharging them, they break no contract, then no one can sue for loss suffered thereby. Trade is free; so is employment. The law leaves employer and employe to make their own contracts; and these, when made, it will enforce; beyond this it does not go. Either the employer or employe may terminate the relation at will, and the law will not interfere, except for contract broken. This secures to all civil and industrial liberty. A contrary rule would lead to a judicial tyranny as arbitrary, irresponsible and intolerable as that exercised by Scroggs and Jeffreys.

But plaintiff says that the defendants *wickedly and maliciously combined and confederated* for the unlawful purpose of causing plaintiff's customers, by means of threats and intimidation, to leave off trading with him; and that the unlawful purpose was accomplished by these means, and thus plaintiff's business was ruined and he caused to suffer great pecuniary loss; and he urges that defendants are liable in damages

therefor, because every act done fraudulently or maliciously and for the purpose and with the effect of injuring another in his lawful business gives good cause of action; and so the Referees have reported; and therefore they recommend the reversal of the judgment sustaining the demurrer.

If defendants, by means of "threats and intimidations," have driven away plaintiff's customers and thus destroyed his trade, they have injured him by an unlawful act, and are liable to him in damages, whether they did it wickedly and maliciously or not. For it is unlawful to threaten and intimidate one's customers; and the loss of trade is the natural and proximate result of such acts. But "threats and intimidations" must be taken in their legal sense. In law a threat is a declaration of an intention or determination to injure another by the commission of some unlawful act; and an intimidation is the act of making one timid or fearful by such declaration. If the act intended to be done is not unlawful, then the declaration is not a threat in law, and the effect thereof is not intimidation in a legal sense. So too of the alleged conspiracy. A conspiracy is an agreement between two or more persons to do an *unlawful* act. If the act to be done is not unlawful, then the agreement or combination is not a conspiracy. The question then is, what were the acts done, or intended or agreed to be done, by which the trading was prevented?

In the second count, which plaintiff specially relies on to sustain this view of his case, after charging generally the use of threats and intimidation, he specifies

as follows: "The said defendants threatened, among other things, to discharge any man in the employ of said railroad company who should trade with plaintiff, and this threat was published," etc. This is the only "threat or intimidation" specified. But this act was not unlawful as we have seen, and to denounce a determination to do it and thus deter customers from trading with plaintiff, was not "threat or intimidation" in a legal sense. From this it is fairly inferable that, in this count as in the first, plaintiff, though he uses the general terms "unlawful and malicious threats," refers only to the so-called "threat" to discharge employes and rests his case upon it. Presumably he has particularized the most wrongful act, or, at the most, the other "unlawful and malicious acts" are of the same, and no worse character than that specified. This act, he says, was done by the defendants *wickedly and maliciously* with the intent and effect of breaking up his business.

The question then is: Is an act not unlawful, rendered actionable to the one suffering injury therefrom, because it is committed wilfully, wickedly and maliciously, and in pursuance of a conspiracy to do the injury suffered? Does one render himself liable in damages for maliciously and wickedly exercising his rights or denouncing his intention of so doing, if thereby he injures another?

The cases relied on by plaintiff, cited by Mr. Addison in his work on Torts, sections 20, 22, where tenants were driven away from holdings, scholars frightened from school, persons prevented from trading at

one's store or with his vessel, buyers and workmen driven from a quarry, do not serve as precedents, for the reason that in all of them the defendants either committed or threatened unlawful acts. In most of them violence was used or menaced; in some, statutory misdemeanors were committed, in others fraud, duress or libel was resorted to. This relieved the cases of the difficulty or doubt which exists in this, where there is no libel, violence or broken statute. In section 40, however, it is declared broadly, that "every malicious act is wrongful in itself in the eye of the law, and if it causes hurt or damage to another it is a tort, and may be made the foundation of an action." Upon this plaintiff relies, and upon it the Referees have based their report; and if this broad statement contains a correct exposition of the law they are right, and the demurrer should be overruled, for the declaration abounds in charges of malice and wrong. But is this the law?

To answer this correctly it must first be understood what is meant by "malicious act." In common parlance it is an act proceeding from hatred or ill-will, or dictated by malice, or done with wicked or mischievous intentions or motives. But surely this cannot be the sense in which the phrase is employed by Addison; for if it were, then my neighbor would be liable to me, if from ill-will or wicked motive he refused to let me get water at his spring; or to make a road for myself across his farm, or locked his pump or his gate against me, or built a fence on his own land across my path; or built his store or shop or a high

fence on his own land in such close proximity to my windows as to exclude light and view; or digged on his lot below the foundation of my house so as to endanger it. It is unreasonable that actions should be maintained for any of these things. For, though my neighbor is causing me hurt, and that too from wicked motives, and is thus violating the moral law, he is only exercising his undoubted right to use his own for himself and deny me all privilege in it; and this the law does not punish as has been often ruled in courts of the highest character: *Story* v. *Odin*, 12 Mass., 157; *Mahan* v. *Brown*, 13 Wend., 261; *Auburn & Cato Railroad Company* v. *Douglass*, 5 Seld., 447; *Lasala* v. *Holbrook*, 4 Paige, 169; *Thurston* v. *Hancock*, 12 Mass., 220.

Judge Cooley, in his work on Torts, page 278, says: "It is a part of every man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern." And again on page 688: "The exercise by one of his legal right cannot be a legal wrong to another. * * * Whatever one has a right to do another can have no right to complain of." This he considers a mere truism.

Baron Parke said in *Stevenson* v. *Newnham*, 13 C. B., 285: "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent." And Judge Black, in *Jenkins* v. *Fowler*, 24 Penn. St., 308, declares: "Any transaction which

would be lawful and proper, if the parties were friends, cannot be made the foundation of action merely because they happened to be enemies. As long as a man keeps himself within the law by doing no *act* which violates it, we must leave his motives to HIM who searches the heart." Judge Cooper, in accordance with these views, has declared in *Macey* v. *Childress*, 2 Tenn. Ch., 442: "It is no *defense* to a legal demand, instituted in the mode prescribed by law, that the plaintiff is actuated by improper motives. The motive of a suitor cannot be inquired into. Were it otherwise, nearly every suit would degenerate into a wrangle over motives and feelings." The question was ably argued and received elaborate consideration in the Supreme Court of Maine in the recent case of *Heywood* v. *Tillson*, 46 Am. Rep., 373; wherein it was decided without dissent that no action lies by the owner of a house against one who maliciously refuses to employ any tenant of such house and thus prevents the renting. Indeed, the contrary ruling would lead to evils innumerable. It would be unendurable that our courts of law should be perverted to the trial of the motives of men who confessedly had done no unlawful act. It is suggestive of the days of "constructive treason."

Upon both reason and authority it seems obvious, therefore, that the phrase "malicious act" cannot be used by Mr. Addison in this connection in the popular signification, as understood and applied by the Referees in this case; or if so used by him it is not a correct statement of the law.

In another sense it is correct. Prof. Greenleaf, in his 2nd volume on Evidence, section 453 (2), thus defines a malicious act: "In a legal sense, any *unlawful* act, done wilfully and purposely to the injury of another, is, as against that person, malicious." To determine then, whether a "malicious act" is "wrongful," in the legal sense, and therefore actionable, we must first determine whether it is unlawful. But if unlawlul, and injurious, it is actionable, irrespective of the motive; and whether malicious or not, if not unlawful and injurious, then it is not actionable, even though malicious and wicked.

Plaintiff appeals with confidence to the legal maxim: There is no wrong without its remedy. Far be it from us to shake the public and professional confidence in this venerable maxim of the English common law. Its influence has long been and will long continue most wholesome in preventing the private redress of real and imaginary wrongs. But as it is a legal maxim, it must be taken in a legal sense. So taken it can obviously mean no more than that there is a legal remedy for every legal wrong, *i. e.*, every injury suffered as the consequence of an unlawful act, or a lawful act done in an unlawful manner. Neither is shown here. Defendants have merely warned their employes not to trade with plaintiff; if they do they must give up their employment. They had the right to discharge them on this ground; it was not unlawful, but highly proper, therefore, to give them warning of their intention. The manner of giving the warning was not unlawful or even censurable. The posted notice con-

tained no word of slander, libel or reproach upon the character of plaintiff; no charge or insinuation that he was dishonest or unfair in his dealing. Omitting any attack on plaintiff's character as a man or trader, defendants, in the usual manner, and in a few harmless words, told its employes to stop trading with him or they must stop working for them. The common law does not forbid such an act, nor has our Legislature yet endeavored to make such an act unlawful by statute, as has been done in some of the States, and probably in England. No legal wrong has been done; therefore there is no legal remedy. For the moral wrong of the act, if there be any, defendants may be called to account in another tribunal. Courts administering the civil law cannot punish sin or wickedness unless it be committed in violation of the civil law, which is the measure of their jurisdiction.

Nor will the maxim "*sic utere tuo, ut alienum non lædas*" aid the plaintiff in his contention. As commonly translated," "So use your own as not to injure another's," it is doubtless an orthodox moral precept; and in the law, too, it finds frequent application to the use of surface and running water, and indeed generally to easements and servitudes. But strictly, even then it can mean only: "So use your own that you do no legal damage to another's." Legal damage, actionable injury, results only from an unlawful act. This maxim also assumes, that the injury results from an unlawful act, and paraphrased means no more than: "Thou shalt not interfere with the legal rights of another by the commission of an unlawful act;"

or "Injury from an unlawful act is actionable." This affords no aid in this case in determining whether the act complained of is actionable, that is, unlawful. It amounts to no more than the truism: An unlawful act is unlawful. This is a mere begging of the question; it assumes the very point in controversy, and cannot be taken as a *ratio decidendi.*

A majority of the court, therefore, conclude that the act done, *i. e.*, the publication of the notice that the company would discharge employes who traded with plaintiff, was not an unlawful threat nor an unlawful act; was not a libel; and, though done wickedly and maliciously, and in pursuance of a wicked design, is still not actionable, because it was not an unlawful act, nor an act done in an unlawful manner.

The report of the Referees will therefore be set aside, and the judgment of the circuit court affirmed.

FREEMAN, J., delivered the following dissenting opinion. TURNEY, J., concurring:

The declaration in this case in the first count is substantially that plaintiff occupied a store in the city of Chattanooga, in the center of five railroad *termini* leading into the city, and had built up a large and profitable business with the employes of said roads, and was especially selling many goods and doing a large business with the agents and employes of the defendant company, and that defendants conspired to break up, injure and destroy him by issuing an order

from the superior officer, J. C. Anderson, to the yard-master of the road to the effect as follows:

J. T. Robinson, Y. M.—Any employe of this company on Chattanooga pay-roll, who trades with L. Payne from this date will be discharged. Notify all in your department.

Like orders were issued to other heads of department of work in said company. He then avers he was brought into disrepute and greatly damaged—his business ruined.

The second count alleges that the defendants wantonly and maliciously undertook by means of threats, intimidation, slander, etc., to oppress, injure and damage plaintiff in his business, and threatened to discharge any employe of said road who should trade with plaintiff, so that this being generally circulated, not only the employes were debarred from trading with him, but he was brought into reproach, disrepute and suspicion, and lost his other trade and customers.

I assume that these two counts fairly aver that defendants conspired to injure the trade and business of plaintiff, by an order to the employes of the railroad company, issued by the party who had the authority to enforce it, that any employe who should thereafter trade with plaintiff—that is patronize him in his business—should be discharged from the employment of the company, and that this was done maliciously in the legal sense of that term (if it was unlawful), because a wrongful act, or an act done to the injury of another, without any legal excuse or justification.

In this view the particular motive of the party, so

far as it was prompted by personal ill-will, would not be important, except in aggravation of damages, or showing the evil purpose of the act, or in giving punitive damages, should a jury deem it a proper case for punishment on all the facts.

The whole case turns probably on the question as to whether such a conspiracy, carried into effect by the issuance of the order, is the exercise of a lawful right, or is violation of law. I shall consider it in this aspect of it. I think the soundest principles of law well settled, and never questioned at this day, as well as the demands of public policy for this country, all things considered, demand that the facts charged shall be the basis of an action and recovery, unless defendants shall show something that shall justify their conduct and authorize the act, more than a mere will to do it. What might justify such conduct will be noticed before concluding.

It is true this case is one of first impression in our State, and we have no precedent precisely covering the facts to guide us. It might even be conceded, that the precise principle involved had never been adjudicated by our courts, and still a remedy might well be found growing out of the analogies of our law, taking other principles that are settled as the basis on which the rule should be formulated, and its correctness reasoned out and indicated.

We might even go further and say if the exigences of our advancing civilization demanded it, a new principle might be formulated to meet that demand, and this principle embodied in the well established forms

of remedy found in our system of remedial jurisprudence. It is as much a part of the common law, that it has growth and expansive power to meet the wants of an advancing and necessarily complex system of civilization, as that precedent shall have its due influence in settling what that law is at any period of that growth. Both principles have their legitimate spheres of operation, and are equally legitimate, when properly brought into play and judiciously used by enlightened courts. In no other way can that law be conceived to grow, and that growth is one of its most striking historic elements, can easily be seen by seeing what it was in the pages of Bracton, or even our more modern legal classic, Blackstone, and what we find it to-day, as we administer it. I need but say it will be found, that almost all, at least seventh-tenths of what we administer every day, was unknown in the time of Blackstone, and undreamed of by that great master of the common law, as it was in his day. "The process of growth," says Judge Cooley in his work on Torts, page 12, has been something like the following: "Every principle declared by a court in giving judgment is supposed to be a principle more or less general in its application, and which is applied under the facts of the case, because, in the opinion court, the facts bring the case within the principle. The case is not the measure of the principle, it does not limit and confine it within the exact facts, but it furnishes an illustration of the principle which might still have been applied, had some of the facts been different. But cases are seldom exactly alike in their

facts; they are, on the contrary, infinite in their diversities, and as numerous controversies on differing facts are found within the reach of the same general principle, the principle seems to expand, and does actually become more comprehensive, though so steadily and insensibly under legitimate judicial treatment, that for the time the expansion passes unobserved." So much for growth in this way.

"But," he adds, "new and peculiar cases must arise from time to time for which the courts must find the growing principle, and these may either be referred to some principle previously declared, or to some one which now for the first time there is occasion to apply."

If the present case can be ranged under either one of these categories, it will find a legitimate place in the jurisprudence of our State. I assume it may be properly solved by a sound application of already established principles, and shall attempt to show that they solve it by sustaining the right of the plaintiff in what he has averred in his declaration (the case standing on demurrer to a recovery), *prima facie* at least, and this is all that is necessary in the present aspect of the case.

It is axiomatic in our law, that there is no wrong without a remedy. I concede this necessarily means no legal wrong, therefore the question is whether there is a legal wrong in this case, if so the remedy follows as a matter of course. I may further concede frankly, that it is a self-evident proposition, that where a party has the legal right to do a thing, the *motive*

with which he may assert his right, will not give a right of action, even where malice prompted the act: Wait's Act. & Def., vol. 1, 35, 36, and cases cited.

Is a legal wrong averred in this case? It is ingeniously and most ably argued, that none has been done, and cases cited in support of the view decided by various courts, in which with more or less directness, it has been so adjudged. With proper respect for these courts, I am compelled to differ with them, and proceed to give my reasons.

The sound principle, I think, is stated by Mr. Addison—a writer of accredited reputation—in his work on Torts, page 20: "Injuries to property, *indirectly* brought about by *menaces*, false representation or fraud, create as valid a cause of action as any direct injury from force or trespass. Thus if the plaintiff's tenants have been driven away from their holdings by the menaces of the defendant, damages are recoverable for the wrong done." So in a note to this by an American Editor, it is said, "that preventing a person from trading with another, by posting placards near his place of business calculated to bring him into contempt and injure his business, or issuing circulars and posting them near a person's work-shop, the legitimate and natural effect of which is to cause his workmen to leave his employ," are actionable by the party injured. For this is cited *Gilbert* v. *Mickle*, 4 Sand. Ch., (N. Y.), 357, and *Springhead Spinning Company* v. *Riley*, Law R., 6th Eq. Cases, 537.

Let us apply these principles to the case in hand. It is seen that they involve no element of contract

as between the party suing, not even in the case of the landlord whose tenants have been driven off by menaces, nor privity of contract. But the injury was simply a pecuniary one to him by loss of profits from his land by reason of the absence of his tenants. That case has precisely the same essential elements in it that this has. It was an injury resulting to a third party by operating upon another, or threatening such wrong. This is the same in principle. The menace or threat in the order issued is a wrong done to the freedom of the employe to buy where he chooses or may find it to his interest to buy. The tenant in that case may have had no right of action by reason of the mere menaces, would not have had, yet the landlord did have, because he was pecuniarily injured by the act, though the tenant may not have been. The case of *Gilbert* v. *Mickle*, is precisely in point, where persons were prevented from trading with another, by placards calculated to bring him into contempt and thus his business injured. And so the English case of circulars posted up, the legitimate effect of which was to cause his workmen to leave him. So much for adjudication on the point. That the issuance of an order by an agreement between the railroad corporation, and its officer having an authority to discharge—threatening discharge from employment if the employe should buy from a party in business, would be more effective, and a more direct means to effect the end designed, than a placard or circular addressed to or read by parties over whom the parties had no control whatever, need not be argued. We

should have to shut our eyes to the truth of the case to doubt on such a question. Let us see if this view is not sustained by the sound analogies furnished from other well established principles. It is well established that an action does not lie against a person for causing an injury by an accident unavoidable: Wait's Act. & Def., vol. 1, 160, and cases cited. But if any blame attaches to the party, by reason of the *negligent* performance of the act, then he is responsible: *Id.*, vol. 6, 119. One who, without intention inflicts personal injury, will not be liable, if he exercised the *prudent* care and *diligence* demanded by the circumstances: *Id.*, and authorities cited.

If a party is held responsible in damages, where he is doing an act itself lawful, simply because of want of due care which was prudent to exercise under the circumstances, and for this negligence is held to answer in damages for an act beyond his intention, and it may be one, the result of which he would have never voluntarily sought. Much more ought he to be held liable, where the act is one deliberately purposed and the result deliberately sought, and the means most effective and best calculated to produce the result deliberately adopted and persistently carried out.

It will be said the injury is the result of negligence and this was unlawful only because it produced injury, as in the case of a man shooting arrows at a mark, and one glanced and struck another, he was held responsible in damages, although the act was lawful in itself, even as far back as the year books See Wait, vol. 1, 160.

So here is an act threatened and done which of itself might be lawful, that is to discharge the employe, but when you add a conspiracy to do so in all cases, if the parties trade with another and thus injure him, and to do this with that purpose, here is an act done directly with the evil intent that injures another, and much more should the party respond in damages for it. Whenever there is an act done with the purpose to injure another, and not simply in the exercise of one's legal right and that injury is produced, and the means used naturally tend to the end designed, then for that injury the party should be held responsible, even though the act with no such purpose, and no such result might be lawful. Thus, if A sets fire to his own fallow ground, as he may lawfully do, which communicates to and fires the woodland of his neighbor, no action lies unless there was some negligence or misconduct on the part of him or his servants: 8 John., 422, and other cases; Wait, vol. 1, 161. Numerous like cases are found, all involving the same principle.

But if the party is held responsible for want of due care and precaution to prevent injury to his neighbor, when he exercises a clear legal right, how can it be, that if without any cause, on the contrary, with the well conceived plan, and of deliberate purpose he does an act, which might be lawful of itself, solely for the end of doing that injury?

Judge Cooley in his work on Torts, page 693, in treating of the effect of motive, in doing an act which the party had the right of itself to do, says: "Sup-

pose, for instance, a man should make an excavation on his own ground for the mere purpose of annoying his neighbor, and compelling him to be at expense of supports for his building, would not his motive demand of him the observance of more than ordinary care to avoid injury? Suppose he were to build a fire on his own premises for the sole purpose of incommoding a neighbor with smoke and dust, and the fire should spread to the neighbor's premises, the motive itself strengthens greatly any other evidence that might exist of the want of proper care to prevent the fire spreading?" The point, he adds, "is not without interest, and it would seem that there must certainly be some difference between the man who proposes to keep within the limits of the legal right, and also to cause no annoyance and the man who proposes to cause what annoyance he may find possible without exceeding these limits."

I answer, there should be such a difference, but it is not found in requiring more care in the case of the act done with the bad motive, for in either case due care must be taken, and if any negligence occurs the party is liable, as held by this court at this term in the case of *Sallie* v. *East Tennessee, Virginia & Georgia Railroad Company*, and that where the injury was done to another by the use of one's own property, he was bound to show that all precautions were taken to prevent it. The care in such a case must be such as is reasonably adapted to prevent the injury, and the want of this would make the party liable regardless of motive. But now suppose the act is done,

say the fire kindled, not to annoy simply, but with the purpose the neighbor's property *shall* be destroyed by it, and it is so placed, as that naturally it will be likely to reach his buildings; no one ever doubted the party would be liable for this purposed wrong. Suppose the excavation is made to annoy, and purposely so planned, that it shall from the nature of the soil, undermine and destroy his neighbor's building, would not this be beyond, and a much stronger case of liability, than mere neglect of proper precautions? Suppose in the case of the *Coal Chutes* it had appeared that the company had no need to put them near the party's dwelling, but had purposely put them there to destroy its value, would it not be much more liable for the injury than if it had simply failed to use the most effective means to prevent it? I think it would, both in law and sound morality, as well as a true public policy.

It is settled by a large weight of authority, that a man may become a trespasser by the improper use of his own premises or property, as by excavating his soil so as to divert the natural flow of a stream from the adjoining owner: *VanHœsen* v. *Coventry*, 10 Barb., 518. Or to displace a party wall: 6 Duer., 17. Or to undermine the natural lateral or subjacent support of the land of his neighbor: 1 Law & Eq. R., 241. In all these cases the act itself is lawful, but when it is so done as to injure a neighbor it becomes actionable.

Now, in all these cases the law gives a remedy where an injury is done to another, simply because a

party, though exercising a legal right, and using his own, has neglected proper precautions to prevent an injury to his neighbor; much more should it give a remedy, where the injury was purposed, and the use or exercise of his own right is only a cover to injure his neighbor. The exercise of no legal right *per se* will in the slightest degree be infringed. The party would only be required to exercise his legal rights for proper and justifiable purposes, and wherever these were shown there would be no liability, but whenever the exercise of the right was solely for the purpose of injury to another, and such injury followed, he should respond in damages for that which he had purposely inflicted. He cannot complain at the purposed result of his own act being visited upon him.

If, however, he could show it was exercised for justifiable cause as in this case, because the party supplied liquor to intoxication or impure food, or the like to his employes, by which their efficiency was lessened and he injured, then such an order would be justified.

This question is discussed with much ability in an opinion by Chief Justice Appleton, of the Supreme Court of Maine, A. R., 373, *Haywood* v. *Tillson*. It was there held that no action lay by the owner of a house against one who maliciously refuses to employ any tenant of such house and thus prevents its renting. This case is different or stronger than that, as is shown or averred that the purpose of the order is to injure the plaintiff's business. In that case no such purpose was shown. There was a mere threat in that case, that no man who was a tenant of plain-

tiff's house should work for defendant, The party was under no obligation to employ such occupant, nor had any one been turned out of employment on account of occupying the house. It was only a threat, and nothing more, and there were other reasons justifying the threat.

I concede the argument of the opinion is in support of the view of defendants in this case, but in so far as it does support it, I do not think it sound. The plaintiff had the property in the goodwill of his business, which consisted largely in the location of his house near the work shops of defendant, it may have been purchased by reason of this advantage. That location gave him the right unrestrained to all the natural trade advantages incident to that locality. The location with these advantages would render his business far more valuable, and the property owned by him proportionately valuable. This value would consist largely in convenience for obtaining the custom of the employes of defendants. That they are numerous is averred, and the effect of the order calculated and certainly effective to prevent his getting this custom, and thereby destroy much of his trade theretofore had. In addition it is seen that the withdrawal of so many customers would naturally tend to excite suspicion against plaintiff's character as a tradesman, and thus his injury be increased. All this, taking the averments of the declaration were results that might be foreseen, and were the natural result of the act of defendants, and they should be held responsible as others for such results if proven, and

no justifiable reason or excuse given for the order. On this question, as I have shown, there may be found both authority, and as I think, sound legal analogy in favor of the propositions maintained. There are authorities and plausible reasonings, it is conceded, on the other side. The question is which is the better rule, and which will best serve the ends of a sound public policy?

The rule I have maintained is in strict accord with a maxim of the law, so well founded in reason as to need no argument or authority to support it, that is, that a man must so use his own as not to do an injury to others. That this means he shall so enjoy his legal rights, as not to do a wrong to the legal rights of another, I freely concede. But here is a use of his legal right to discharge employes, for the direct purpose and with no other, and for no other reason except to prevent their trading with a party legitimately entitled by his location and the character of his business to such trade. Here is the use of a legal right, to deprive the other of that which is his legal right, to-wit, the property he has in the good-will of his business, which consists in his business character for integrity and fair dealing, his convenience of location to his customers, the character of goods he sells, and fairness of price for which they are sold, and the like. All these make up as elements of that property now well recognized in our law as the "good-will" of a business. For a party who has the power, to use that power, to destroy or injure the value of this property, in the exercise of a right, not for any

reason of advantage to himself, but solely to injure another, ought not to be permitted by an enlightened system of jurisprudence in this country.

It is argued that a man ought to have the right to say where his employes shall trade. I do not recognize any such right. A father may well control his family in this, but an employer ought to have no such right conceded to him. In the case in hand and like cases under the rule we have maintained, the party may always show by way of defense that he has had reasons for what he has done; that the trader was unworthy of patronage; that he debauched the employe, or sold, for instance, unsound food, or any other cause, that affected his employes' usefulness to him, or justified the withdrawal of custom from him. This is not in any way to interfere with the legal right to discharge an employe for good cause, or without any reason assigned if the contract justifies it, but only that he shall not do this solely for the purpose of injury to another, or hold the threat over the employe *in terrorem* to fetter the freedom of the employe, and for the purpose of injuring an obnoxious party.

Such conduct is not justifiable in morals, and ought not to be in law, and when the injury is done as averred in this case the party should respond in damages. The principle will not interfere with any proper use of the legal rights of the employer, an improper and injurious use is all it forbids.

In view of the immense development and large aggregations of capital in this favored country—a capital to be developed and aggregated within the life of

the present generation more than a hundred fold—giving the command of immense numbers of employes, by such means as we have before us in this case, it is the demand of a sound public policy, for the future more especially, as well as now, that the use of this power should be restrained within legitimate boundaries. Take for instance the larger manufacturing establishments of the country—of which we will in time have our full share, when thousands upon thousands of hard-working operatives will be employed. It will be to their interest to have free competition in the purchase of supplies for their wants, and its beneficial influences in keeping prices at the normal standard. The merchant and groceryman, and other traders should be untrammelled to furnish these, and the employes untrammelled in the exercise of his right to purchase where his interest will best be subserved. If, however, these masters of aggregated capital can use their power over their employes as in this case, all other traders except such as they choose to permit will be driven away or crushed out, and their capital probably alone have a monopoly to furnish his employes at his own rates freed from competition. The result is that capital may crush legitimate trade, and thus cripple the general property of the country, and the employe be subject to its grinding exactions at will.

The principle of the majority opinion will justify employers, at any rate allow them to require employes to trade where they may demand, to vote as they may require, or do anything not strictly criminal that employer may dictate, or feel the wrath of employer by

dismissal from service. Employment is the means of sustaining life to himself and family to the employe, and so he is morally though not legally compelled to submit. Capital may thus not only find its own legitimate employment, but may control the employment of others to an extent that in time may sap the foundations of our free institutions. Perfect freedom in all legitimate uses is due to capital, and should be zealously enforced but public policy and all the best interests of society demands it shall be restrained within legitimate boundaries, and any channel by which it may escape or overleap these boundaries, should be carefully but judiciously guarded. For its legitimate uses I have perfect respect, against its illegitimate use I feel bound, for the best interests both of capital and labor, to protest.

In view of the legal reasons and authorities given, and these elements of a sound public policy, I think the rules I have maintained and authorities sustaining them, are the better based in all the elements of sound rules of action that will best subserve the public interest, and at the same time do violence to no right that is exercised with a commendable or just motive, for a commendable and proper end, will only restrain wrong and prevent conduct that no sound judgment will approve as based on a sound morality.

I therefore think the action *prima facie* maintainable, and the demurrer should be overruled.

MAYOR AND ALDERMEN OF KNOXVILLE *v.* SANFORD, CHAMBERLAIN & ALBERS.

MUNICIPAL CORPORATIONS. *Taxation by.* Under an ordinance declaring certain occupations and business transactions privileges, and taxing them as such, among others enumerating "hacks, carriages, drays and wheeled vehicles run for a profit," a firm of merchants are liable who kept a dray used for the hauling of goods to the depot for their non-resident customers and for which service drayage was charged.

FROM KNOX.

Appeal in error from the Circuit Court at Knoxville. S. A. RODGERS, J.

S. G. HEISKEL for Knoxville.

ANDREWS & THORNBURG for Sanford, Chamberlain & Albers.

DEADERICK, C. J., delivered the opinion of the court.

This is an agreed case, showing that defendants are wholesale merchants in Knoxville, and keep a dray and pair of horses, with which they haul from their place of business to the depot, goods sold to their customers to be transported by railroad. For this service they charge drayage, but they charge nothing for delivering their goods to customers in the city, and used their dray for no other purpose.

A warrant was issued for failing to take out a license and the recorder fined each of the defendants

$3.33⅓, and they appealed to the circuit court. His Honor, the circuit judge, reversed the judgment of the recorder and discharged defendants, and plaintiffs have appealed to this court.

The question presented is, are the defendants bound to take out license to run their dray or wagon upon the facts disclosed in the agreement?

By an ordinance certain occupations and business transactions were declared privileges and taxed as such, and were not to be pursued without license. Amongst other things enumerated were "hacks, carriages, drays and wheeled vehicles run for profit."

The power to pass the ordinance is not questioned, but defendants insist they are not liable to the tax because the running of the wagon is not their occupation or business, but is only an incident and convenience in the conduct of their business as merchants, and they do not fall within the provisions of said ordinance. They charge only such of their customers drayage as receive their goods by railroad, and do not haul for and receive pay therefor from the public. It is also ingeniously argued that running their dray is neither their occupation nor their business. The ordinance taxes the occupations and business transactions specified. The running of the dray to the depot for pay may not be the chief occupation or sole business of defendants, yet it is a business transaction, and although it may not yield sufficient profit to defray the expense of it, it is nevertheless run for pay or profit, as their customers are required to pay for the service rendered. The law and the ordinance treat the bus-

iness of merchandising as distinct from the running of a dray, and the fact of the latter being useful in the conduct of the former cannot excuse the necessity of obtaining license for both. Although the defendants do not exact pay from all their customers for the service of their wagon, they do charge and receive pay from a large class of persons—their non-resident customers, and fall within the description of the ordinance as being engaged in business transactions for profit or pay.

We are of opinion the judgment of the circuit judge was erroneous and it will be reversed, and judgment will be rendered here affirming the judgment of the recorder.

W. T. LANE, Trustee, *v.* EAST TENNESSEE, VIRGINIA & GEORGIA RAILROAD COMPANY.

BONDS. *Coupons. Interest.* The endorser of a negotiable State bond, whose liability has been fixed by demand of payment of the bond at maturity, protest for non-payment and notice, is thereby rendered liable for the unpaid coupons then attached to the bond, with interest thereon, without a separate presentment for payment of the several coupons as they fell due, protest for non-payment and notice.

FROM M'MINN.

Appeal from the Chancery Court at Athens. W. B. STALEY, Ch.

BURKETT & LANE for complainant.

W. M. BAXTER, A. BLIZZARD and P. B. MAYFIELD for defendants.

COOPER, J., delivered the opinion of the court.

The defendant was held liable, on a former day of the term, as the endorser of certain State bonds, which were duly protested at maturity for non-payment, and notice thereof given to the defendant. The only question raised by the petition for rehearing is whether the defendant is liable for the amount of the unpaid coupons attached to the bonds sued on, with interest thereon since their maturity. The argument in support of the petition for rehearing is that, in order to hold the endorser of the bond liable, it being otherwise as to the maker, it is necessary to present the coupon for payment at maturity, protest the same for non-payment, and give the endorser notice.

All of the authorities cited in support of this contention relate to coupons detached from the bonds. If the coupons are in a negotiable form and cut from the bonds, all the authorities agree that they may be treated as negotiable securities, and accordingly presentment, protest and notice to hold an endorser may be required. But the rule is altogether different in regard to coupons allowed to remain attached to the bond. Municipal bonds stipulate on their face for the payment of interest, and therefore the maker will be liable on the coupons although they show no promise on his part: *Mayor, etc.*, v. *Potomac Insurance Com-*

pany, 2 Baxt., 296. The bonds sued on in this case expressly call for "interest at the rate of five per cent per annum payable semi-annually." Such a call would be good and make any party liable for the bond equally liable for the interest payments, with interest on each payment, without any coupons: *House* v. *Tennessee Female College*, 7 Heis., 128. But the interest stipulated is a mere incident of the debt, even if it be put in the form of detachable coupons, as long as those coupons remain attached to the bond. The holder of the bond, as said by the Supreme Court of the United States, has his option to insist upon payment of the coupon and treat it as a separate negotiable security, or to allow it to run until the maturity of the bond, that is until the principal is payable: *Cromwell* v. *County of Sac*, 96 U. S., 51, 58. The coupons are mere incidents of the debt as long as they remain attached to the bond, and the same act which fixes the liability of the endorser for the debt equally fixes his liability for the interest, the payment of which is expressly stipulated for in the bond. The coupons cease to be incidents of the debt, and become independent claims only when detached: *Clark* v. *Iowa City*, 20 Wall., 583; *Walnut* v. *Wade*, 103 U. S., 683, 696.

Rehearing disallowed.

JOHN R. ROWAN *v.* J. C. WARNER *et al.*

WILL. *Construed.* The will of John Ramsey bequeaths all his real estate to his wife, and provides that "at her death it is my wish and desire that my real estate be divided equally between my son, John C., and daughter, Martha S. The heirs of my deceased daughter, Mary Jane, being hereafter provided for in this instrument. After settling all claims for and against the estate, the balance, together with my personal property, I leave to the judgment of my son, John C., and Martha S., believing they will do what is just and right by each other, and their deceased sister's children." Out of the personal property certain special bequests are made, including one to his grand-daughter, Susan C. Rowan. The will further provides "After deducting what I gave to my deceased daughter, Mary Jane, during her life, and paying what my estate is responsible for, it is my wish and desire that my executor pay to my deceased daughter's children, after they become of age, the balance, should there be any balance, that may be coming to them as the heirs of their mother's part of my estate. In the event of the marriage of my daughter, Martha S., before the death of her mother, it is my wish that she be provided with a home, either by a division of the farm or by my son John C., paying to her the value of the half interest of said farm as they may agree upon." *Held*, that under said will the children of the deceased daughter took no interest in the real estate.

FROM MONROE.

Appeal from the Chancery Court at Madiosonville. W. M. BRADFORD, Ch.

PRICHARD & CHAMBERS for complainant.

P. B. MAYFIELD and MCCROSKEY & HICKS for defendants.

TURNEY, J., delivered the opinion of the court.

The will of John Ramsey is: "First, I do will,

bequeath and devise to my beloved wife, Susannah Ramsey, all of my real estate during her life, and at her death it is my wish and desire that my real estate be divided equally between my son, John Eagleton Ramsey and Martha Susannah Ramsey. The heirs of my deceased daughter, Mary Jane Rowan, being hereafter provided for in this instrument. After settling all claims for and against the estate, the balance together with my personal property, I leave to the judgment of my son, John Eagleton Ramsey and Martha Susannah Ramsey, believing that they will do what is just and right by each other and their deceased sister's children; it is my wish and desire that out of the personal property now on hand, that my daughter, Martha Susannah Ramsey, have one bay roan filley named Lucy, and that my daughter-in-law, Martha Ellen Ramsey, have one bay roan filley named Sallie, and that my little grand-daughter, Susannah Elizabeth Rowan, have one sorrel roan named Metta, together with a cow, bridle and saddle, clothing and schooling. After deducting what I gave to my deceased daughter, Mary Jane, during her life, and paying what my estate is responsible for, it is my wish and desire that my executor pay to my deceased daughter's children when they become of age the balance, should there be any balance that may be coming to them as the heirs of their mother's part of my estate. In the event of the marriage of my daughter, Susannah Ramsey, before the death of her mother, it is my wish that she be provided with a home, either by a division of the farm or by my son, John Eagleton Ramsey,

paying to her the value of the half interest of said farm as they may agree upon."

The question is, do the children of the deceased daughter, Mrs. Rowan, take any interest (under the will), in the real estate? We think not. The first and last clauses of the will seem to conclusively settle the question against their claim. By the first the devise is in the positive language: "That my real estate be divided equally between my son, John Eagleton Ramsey and Martha Susannah Ramsey, the heirs of my deceased daughter, Mary Jane Rowan, being hereafter provided for in this instrument."

By the last clause a home is to be provided for Susannah Ramsey by a division of the farm or by the son paying to her the value *of the half interest*. If there was a doubt of the intention of the testator as expressed in the first clause, there can be none, as we think, when the two clauses are construed together Requiring the son to lay off to the sister the one-half of the farm or to pay her the value of the one-half thereof makes it clear that the testator meant what the language of the first clause imports, that the real estate should be equally divided between them. The language of the first clause, "after settling all claims for and against the estate, the balance, together with personal property I leave," etc., was, we think, intended to embrace monies due or to be due to the testator, and that such monies when collected, should be first applied to the payment of debts owing by the testator and if there be a balance after the discharge of indebtedness, that balance was to be dis-

tributed as other personalty. The term "with my personal property," was used as applicable alone to such personal property as the testator might have on hand at his death as contradistinguished from claims due the testator and collected after his death. It was not used in its strictly legal signification of embracing all the personal assets of the testator. The language as a whole has reference alone to such effects as are first liable to the payment of debts, and divides them into the two classes of claims due the estate to be collected and of personal property on hand.

Leaving such property to the judgment of the son and daughter is an absolute bequest for the benfit of the children of the deceased daughter, and confers no discretion upon the son and living daughter. We do not think the record shows the testator to have been responsible for any debt for which the children of the deceased daughter should account under the directions of the will.

The defendants will pay all costs that have accrued up to the present time. If complainants desire the cause will be remanded for an account upon the principles indicated in this opinion.

The decree of the chancellor and report of the Referees will be modified to conform to this opinion, and in other respects affirmed.

A. R. HUME, Administrator, *v.* ALEX. WARTERS, *et al.*

GUARDIAN AND WARD. Pension money received by guardian is for support and maintenance of ward, and when received the guardian must show that he has faithfully applied it to the purposes for which it was designed. A liberal policy may be applied in such cases where the court can see that the fund has been actually appropriated to and received by the ward, but if otherwise appropriated the guardian must respond to the extent he fails to show a proper application of the fund.

FROM KNOX.

Appeal from the Chancery Court at Knoxville. W. B. STALEY, Ch.

BAXTER & GREENE for complainant.

CORNICK & CORNICK for defendants.

FREEMAN, J., delivered the opinion of the court.

The bill in this case is by the administrator of George N. Simpson, deceased, against the guardian of his intestate and his sureties, for an account of money received by him during his guardianship.

The defendant, Alexander Warters, was appointed guardian of this and another ward in September, 1875, for the purpose of receiving a pension fund from the Government of the United States, they having no other estate. The two children were at this time entitled to receive $12 per month from the Federal Treasury. In December, 1875, the elder arrived at 16 years of age, and under the law of the United States ceased

to be entitled to any thing. From this time on until the death of the present intestate the guardian received $10 per month for his ward, George N. Simpson, and admits himself chargeable with this sum up to his death in January, 1881. He claims he has properly disbursed this fund for the support and maintenance of this ward. The question presented for decision is the truth of this contention.

The chancellor, on report made by the clerk and master, allowed the guardian a credit of $6 per month for expenditures, under the proof in the case, which left a balance against the guardian of $284.15, for which a decree was rendered and appeal by the complainant. A writ of error is prosecuted by defendant.

The Referees report in favor of reversing the decree of the chancellor, holding the guardian has satisfactorily accounted for the entire fund. The exceptions to this report on the part of the complainant open the whole case for decision.

The facts are, that the ward lived with his mother, a colored woman, in the city of Knoxville, she having a small home with three or four other children. She was poor, had no income except such as she received from washing.

The guardian tenders an account of over $700, and shows that he furnished all the articles therein charged during the years of his guardianship to the mother of his ward, except the sum of $69.70, the items of which sum are shown to have been specifically for the son, and were proper for his use. Much of the other part of the account, in fact nearly all

would be appropriate for the mother in housekeeping, and in supplies for her family, but would not be appropriate for a young boy—such as prints, a sewing machine, large quantities of soap, provisions and the like articles. The greater portion of all this was furnished by the firm of Warters & Bro., of which the respondent guardian was a member. In fact it clearly appears that the guardian simply allowed the mother, as one of the partners swears, and we believe defendant also, to take up the amount of the pension money in the store, and use it for the support of herself and family, including the ward, and then says, he intended it to go for the support and maintenance of his ward. No special contract for the support and maintenance of the ward is shown, nor do we think any was made. The mother simply supported her son, fed and clothed him as she did the other children, and received the pension money, or rather supplies, and sometimes small sums of money from the guardian, absorbing the pension. This money she expended as she pleased in support of herself and family, the guardian giving no attention to it whatever, was perhaps only careful that she should not take up more than the sum to be received from the pension, it being generally all taken up before the money was received. The fund was thus managed up to the death of the ward, the guardian never settling his account with the county court, or in any way looking after the fund or accounting for it, except by charging his ward with the amount furnished the mother, for which he now claims a credit, absorbing the whole fund.

This being a pension fund we are relieved from the question of propriety of the guardian trenching on the *corpus* of the fund, as we have several times held the purpose of such pensions was the support and maintenance of the ward up to the age at which it ceases, to-wit, sixteen years.

But when it is shown the guardian has received the fund, he has thereby charged himself with it, and nothing in the law, or purpose for which such money is given by the government relieves the guardian from showing that he has faithfully applied the fund to the purposes for which it was designed, that is to the support and maintenance of the ward according to his circumstances and position in life, as far as the fund will enable him to do so. A somewhat liberal policy may be applied to such a case, where the court can see the fund has actually been appropriated to and received by the ward in such cases, but still it must be shown reasonably by proof, that the fund has gone to the use of the ward, and if otherwise applied, the guardian must respond to the extent he fails to show a proper application of the fund.

With these principles in view what is the result of the facts in this case? It does clearly appear that $69.70 has gone specifically to the use of the ward. It also appears that the balance was paid to the mother, and by her used in support of herself and family, including the ward, aided by such means as she was able to earn by washing, and for a part of two years, the labor of her son, the ward. This last sum was small, but need not be noticed in this case,

as the mother was entitled to the service of her son and proceeds of his labor, and no service was rendered to the guardian by the ward.

It appears with reasonable certainty in this way that the ward, through the mother, did get the benefit of his proportion of the fund used for the support of the family—probably something more in the way of better clothing. But it does not appear that he got more after the sister ceased to be a beneficiary than he did before, and then they were both supported on $12 per month. In view of this the clerk and master reported $6 per month as a proper credit, and the chancellor decreed on this basis, less $72 compensation allowed by him to the guardian.

The only additional proof introduced to sustain the propriety of this expenditure as claimed, is the statement of witnesses in general terms, that it would be worth from $10 to $15 to support this boy. We have repeatedly said this kind of evidence is of no value in such a case, but that the actual items of expenditure made out by reasonable proof, or vouchers showing the payments is the only safe rule.

We conclude on the whole case, the clerk and master and chanceller have about reached the correct conclusion as to the amount properly expended for the ward, and so decree, affirming in this the decree below with simple interest as to compensation.

It clearly appears the guardian was guilty of continued breach of legal duty by failing to settle annually as required by Code, section 2495, or to renew his bond, and was liable and ought to have been re-

moved from office as required by section 2500 of the Code. The goods furnished to the mother were sold by the firm of which the guardian was a member and charged to the ward, and there is nothing to show the price was reasonable. We suspect the profit was large. In view of these facts the question is whether he is entitled to compensation at all?

The order found in the record of the county court authorizing the guardian to use the fund for support of his ward, is of no service to him, as the county court had no authority to make any such order, and he was authorized to use it properly for his ward without such order.

In view of these gross derelictions of duty as plainly required by law, we hold the guardian should not be allowed any thing for compensation. A trustee who undertakes a trust should not be compensated where such gross failure to perform the duties imposed by law is found as we find in this case.

The chancellor's decree will be modified as indicated, the report of the Referees set aside, and the costs of the case be paid by defendants.

WAGNER *v.* SMITH *et al.*

1. VENDOR'S LEIN. Where a suit has been commenced to enforce a vendor's lien, none being reserved on the face of the deed, the equity fastens on the land and no creditor can intervene to defeat the right under that proceeding.

2. FRAUDULENT CONVEYANCES. The test as to whether a conveyance is fraudulent or void as to a creditor is: Does it hinder him in enforcing his debt? Does it deprive him of a right which would be legally effective if the conveyance or devise had not been resorted to?

FROM JOHNSON.

Appeal from the Chancery Court at Taylorsville. H. C. SMITH, Ch.

J. P. SMITH, H. M. FOLSOM and C. J. St. JOHN for complainant.

N. M. TAYLOR and R. R. BUTLER for defendants.

FREEMAN, J., delivered the opinion of the court.

This bill is filed in the nature of an action of ejectment to recover possession of a tract of land described in the pleadings.

The facts substantially are, that Ezekiel Smith, the father, made a conveyance of land of date 1863, but not delivered or acknowledged and registered until 1866, to his son, A. T. Smith, conveying the tract of land about which this controversy is had.

This deed on its face, after describing the land, conveys it to said A. Smith, "to have and to hold the

same to the said A. T. Smith and his heirs forever, with full covenants of seizin and general warranty." The consideration expressed on its face, is the sum of "$2,500 to be paid in good and lawful money," the terms and times of payment not further stated.

On the back of this deed, and acknowleged before the same witnesses, on the same day, to-wit, November 17, 1866, is found the following collateral obligation of the said A. T. Smith:

"I, Andrew T. Smith, hereby bind myself and my heirs, unto Ezekiel Smith, in the snm of $2,500, void on condition that I keep the land conveyed in the writing, and not sell or convey the same in the lifetime of Ezekiel Smith, my father, and take care of him—also of my oldest sister Nancy Anne E. Smith, all with kindness and proper attention.

Given under my hand, this 17th of November, 1866.

[Seal.] A. T. SMITH.

This obligation was duly proven and registered at the time and with the deed of conveyance, and as shown on its face, was written on the back of it.

In April, 1868, Ezekiel Smith filed his bill in the chancery court, stating the fact of the conveyance to the son for the sum of $2,500; $1,000 to be paid in a short time after the sale, balance to be paid either before his death, or after the death of the complainant, to his heirs. In addition to this, he charged the contract to take care of and provide for the father, and the daughter (who was imbecile), during their lives. He then alleged a total failure on the part of A. T. Smith to comply with his contract, by providing or taking care of himself and daughter—and further, "that not one dollar of the purchase money had been paid, not so much even as the interest."

On these charges he bases the theory that the contract has been forfeited, and he entitled to be restored to the possession of the land, and this is the special prayer of the bill, but a general prayer is added, "that on final hearing, your orator have such other and different relief, as he may be entitled to in equity and good conscience, and an injunction to restrain defendant from, in any way, disposing of said land."

A fiat for injunction as prayed for was granted by Judge Luckey, the then chancellor of the district, and injunction bond given, but the issuance of an injunction in fact does not appear, as no proof either of subpœna or injunction is copied in the record filed as evidence in the cause. We must presume the clerk did his duty and issued the writ, as no doubt he did. At any rate, A. T. Smith filed an elaborate answer to this bill, in which he admits that the sale was made "on the cash terms stated, and that no part of the purchase money had been paid," as he says for the simple reason that no part thereof had been demanded or required to be paid, and that this was required.

He then admits the execution of the obligation by himself, and that the deed was not delivered until 1866. He then contests the charges of failure to comply with this obligation by elaborate statements of the transactions between him and his father, and gives as the true reason of the controversy between them, that the old man desired to marry a woman of disreputable character, he being perhaps about eighty years old, and he having opposed this improper alliance.

After this he insists, that even if he had failed to comply with his part of the contract, it was no cause for revocation of the solemn deed of the father. He then insists, that his failure to pay the purchase monev admitted as he says to be due, under the circumstances, furnishes no ground for rescission of the conveyance.

As to the penalty of the bond, he urges a demurrer to this branch of the case on the ground that it was a matter triable at law. This demurrer was never acted upon by the court, but abandoned.

This case continued in court, considerable proof having been taken *pro* and *con*, up to the first day of December, 1875, the chancellor being incompetent to try it, when a compromise was agreed on between the parties, and filed with the clerk and master of the chancery court on third day of same month.

That agreement of compromise is as follows:

"Whereas, I, Ezekiel Smith, filed a bill in the chancery court of Johnson county, against A. T. Smith for a tract of land in said county of 200 acres, and it has been of long standing, therefore this is agreed upon as a compromise. I, A. T. Smith, have agreed to convey the land back to E. Smith for the consideration of the purchase money, which is $3,100, and I, E. Smith, agree to pay the cost of the suit, and return all claims against A. T. Smith in relation to said suit in this court, this December 1, 1875.

(Signed.) EZEKIEL SMITH.

At February term (the next), 1876, a decree was entered reciting the fact that the controversy had been settled by agreement of compromise signed by complainant, which agreement was ordered to be filed in the cause, and decree against Ezekiel for cost, with his surety, and execution ordered.

Complainant is creditor of A. T. Smith, who holds a sheriff's deed for the land in controversy, based on levy of execution in favor of Andrew Cable, issued on 10th of January, a judgment by motion having been had in his favor against A. T. Smith on that day, he having paid a debt on which he was bound for Smith and another. The land was regularly condemned by order of the circuit court, and sold, and complainants have redeemed from the purchaser, as a creditor, and now seeks by this bill possession of the land occupied by A. T. Smith's wife and children, on the title thus obtained.

It is charged that the land was conveyed by A. T. Smith to Eezekiel Smith, in pursuance of the compromise, and other considerations stated, and then he conveyed all but seventy-four acres immediately back to the wife and children of the son, and that the levy was made before the conveyances were complete. The theory of the bill is, that the land in the possession of A. T. Smith, under the deed was subject to the debts of A. T. Smith, that Ezekiel took the seventy-four acres in full of his debt, and then balance was A. T. Smith's, and this conveyance first to the father, and then back to the wife and heirs of the son, was fraudulent and void as to creditors, and therefore interposed no obstacle to the levy of the execution—at any rate complainant is entitled to have the judgments in their favor fastened on the land, and if their deed is not valid, a sale of it for their satisfaction.

The Referees report, the conveyance to A. T. vested

him with absolute title, and the land liable to levy, and the title of complainant complete, the conveyances to E. Smith and to Mrs. Smith void for fraud.

The respondents file various exceptions, very inartificially drawn, the main exception, however, intending to controvert the fact assumed by the Referees, that the deed was an absolute, unconditional conveyance of the land to the son, and insisting the land was liable for the purchase money, as well as the obligation of the bond of A. T. Smith. This is the substance of the exceptions.

If this exception is treated as sufficient, it raises the question, as to what was the interest of A. T. Smith in the land at the time of the levy, and to controvert its liability to levy, except subject to the payment of the purchase money, and compliance with the obligation within on the deed, and in this view presents the question as to what title on the facts of record complainant has obtained by the sale, purchase, and subsequent redemption; unfortunately the argument has been directed mainly to objections to the judgments, levy, redemption and other proceedings, all of which have nothing in them.

Assuming the exception raises the question on the facts stated, whether complainants have got a title which can be enforced against the conveyee of the father, because the said conveyance of the father to the son's wife was fraudulent, as being intended, and having the effect to hinder and delay the son's creditors, or was voluntary on the part of the son, and controverting this because of the existence of the lien

for unpaid purchase money; we proceed to dispose of the question on the facts shown in the record, and stated in the bill of complainant.

The theory of the bill is that Ezekiel Smith compromised his suit by taking seventy-four acres of land in satisfaction of his claims, and that left the balance owned by the son, and that his conveyance of the entire tract to the father, with the understanding that the father should convey to his wife and her heirs, was a mode of making a voluntary settlement of the balance of the land on his wife.

It is true the old man in one sentence of his testimony does say, the seventy-four acres was accepted by him in full satisfaction of the purchase money due him for the whole tract, but this is not all he says, taking it altogether it is clear he only means that this was all that he retained for himself, which was the fact, but he goes on to state the entire agreement to have been that while he reserved this amount to himself, he was to convey the balance to the wife, and the son was to convey the entire tract to him. He is complainant's witness, and he has brought out the whole transaction. In addition he is made to file a written statement before made by which he gives the other terms of the compromise agreement, giving him the privilege of timber, and having his grinding done by a mill on the land conveyed to the daughter, and that he had given up his two notes for the purchase money, on A. T. Smith.

On cross examination, he says it was his intention to accept the whole of the farm (by which he means

land) in full payment of the purchase money, this was all the chance I had, whether I was willing or not. He further distinctly says, that he considered he was giving the son's wife and children a home, and that he never would have agreed to convey any portion of it to the son, giving as a reason that he would run through with it, and that he thought he was only getting back his own land.

The case then stands thus: The father had filed his bill charging the purchase money of $2,500, with interest was due and unpaid, and the obligations of the bond of the son, not kept, on which he had based a prayer for special relief, asking a rescission of the conveyance, but with a general prayer for such other and different relief, as he might be entitled to on the facts charged. The son and vendee had answered admitting the purchase money unpaid, but denying the right to the rescission asked. In this he was correct, but in the facts charged, and admitted by the answer, beyond question under the general prayer of the bill, the complainant was entitled to have the vendor's lien enforced, and the land sold for its payment.

In this state of the case a compromise is agreed on, by which the father is to give up his notes for the purchase money and the obligation of the son—the son to reconvey the whole tract to him—he to receive seventy-four acres to himself, and to convey balance, say of about 150 acres to his son's wife and children. It is clear he would not have compromised the case if the son was to have the land, or he had been required to convey it to him, but being about eighty-

five years old he was willing to give it to his daughter-in-law and her children, after reserving the home and seventy-four acres for himself. Before this conveyance is effected the creditor intervenes, and levies on the land as the land of the son; under this sale complainant claims title. What did the purchaser get? Unquestionably only what the son had—no more, no less: See *Chitwood* v. *Trimble,* 2 Baxt., 78. He had the legal title subject to the obligation of the bond, it having been registered at the time and as part of the consideration of the sale to him. It stood like the defeasance in a regular mortgage. The purchase money was unpaid and the deed conveying the title being absolute—a lien not having been retained in the deed—if the case stood alone on that, under some theories found in our cases, there might have arisen a serious question affecting the rights of the parties. But the vendor had filed his bill—had an injunction forbidding the sale of the land by the vendee, and was entitled under that proceeding to have the land sold for the payment of the purchase money. This suit was a *lispendens* at the time of the levy on the 10th of January, 1876. The compromise was entered into on the 1st of December, 1875, and filed in chancery clerk's office, but the decree in pursuance of it not made by the court until January after the levy. Before this decree was entered, the son, in pursuance of the compromise, conveyed to the father and he conveyed, as a gift, to the wife and grand-children. Concede it was done at request and by the assent of the son, but that it was part of the terms of the com-

promise, and conveyances made merely to effectuate that, then the question is was the transaction on the facts stated, fraudulent and void as to these creditors or any creditors of the son?

Whatever view may be held as to the vendor's implied lien—none being reserved on the face of the deed—in a contest with a creditor of the vendee, all our cases agree to the principle, that where a suit has been commenced to enforce it, the equity fastens upon the land and no creditor can intervene to defeat the right under that proceeding. The *lispendens*, if nothing else, could exclude such creditor, but especially would this be the case where the land was impounded by injunction, as in this case: *Green* v. *Demoss*, 10 Hum.; *Brown* v. *VanLeer*, 6 Hum.; *Mills* v. *Harris*, 3 Head, 332.

The test as to whether a conveyance is fraudulent or void as to a creditor is, does it hinder him in enforcing his debt? Does it deprive him of a right which would be legally effective if the conveyance or device had not been resorted to? If so to the extent that the creditor's right is affected, a fraudulent intent accompanying the transaction, or it being voluntary and convey or being indebted beyond ability to pay, the conveyance is void. These principles are axiomatic, a sale of property whatever be the intent, exempt from execution, or a wife's realty that cannot be sold for the husband's debts, or any intent which the creditor could not reach by process of law, cannot be void as to such creditor, because he is not injured thereby.

This being so, assume the conveyances in this case to have been based on whatever motive you may choose, the creditor could not have been affected by them. The compromise was made of a claim that overrode these creditors. The son could have permitted the bill to have proceeded and the land would have been sold for the purchase money, which would have absorbed it and left creditors nothing. That he has agreed upon a compromise by which the father has it conveyed to himself and then gives it to his daughter-in-law and grand-children, does that change the result. If it had not been so done and the compromise never made, these creditors could have got nothing. They simply get nothing if the compromise agreement is allowed to stand, with the conveyances made in pursuance of it.

Again, if the compromise is to be set aside as intended to defraud creditors, the party must be allowed to stand in *statu quo* as at the time made, and then his bill be reinstated and the same result would follow. It could not be allowed, that one part shall be affirmed, by the present complainant, that is as to the part reserved by the father and the other be held void. There is no principle on which it can be split in parts in order to allow the creditor to squeeze his claim in, and take part of the subject of it. It must stand as a whole or be set aside as a whole.

Without further argument we hold, that as against the result of the *lispendens* then being prosecuted, and the compromise of the same affectuated by the conveyances attached, the complainant must take subject to

these, and that nothing has been conveyed which complainant could have held, if the compromise had not been entered into, and therefore he is not hindered in enforcing any legal right.

Respondents holding under the compromise agreement hold a title in equity superior to complainant's, and cannot be dispossessed of the land thus held. It will so be decreed and complainant's bill dismissed with costs.

D. B. CARLIN *v.* CAMPBELL WALLACE.

LIMITATIONS, STATUTE OF. *Code, section* 2762*b*. The terms of this statute embrace persons temporarily absent as well as non-residents, and make no distinction between those who are non-resident by removal from the State and those who have always been so.

FROM HAMILTON.

Appeal from the Chancery Court at Chattanooga. W. M. BRADFORD, Ch.

GEO. T. WHITE for complainant.

KEY & RICHMOND for defendant.

TURNEY, J., delivered the opinion of the court.

Carlin by his bill charges that he bought of Wallace a lot of ground in the city of Chattanooga at the price

of $4,000, $500 in cash and the balance evidenced by notes for deferred payments. A title bond was executed. Wallace was then (1867, 1868) and is now a citizen of Georgia. All of the purchase money notes have been paid, a part of them by sale (under decree for the enforcement of lien) of a parcel of the lot.

It is charged that at the time of the decree of sale a credit of $111.80 was, by mistake, omitted.

That there was this mistake in calculating a payment of about $218 paid by the clerk and master to Wallace in excess of the amount really due. Whether the $111 is a part of this mistake it is not now necessarry to inquire. That about ten years before the filing of the bill Wallace promised to refund the $111.80 if there had been an omission to allow the proper credit as claimed; that Wallace refuses to make title as covenanted in his bond, with a prayer for the relief necessary. There was demurrer which was overruled by the chancellor. The Referees recommend an affirmance.

The first ground of demurrer is that a decree of the chancery court divested Wallace of title and vested it in complainant. Such decree is not in compliance with the bond, inasmuch as it does not bind Wallace to the covenants of warranty undertaken to be given upon the payment of the purchase money.

The second ground that Wallace is a non-resident, and the court has no jurisdiction to compel him to make a deed may be technically correct, but as property has been impounded by attachment, the court has jurisdiction to keep its custody for the security of

complainant until defendant complies with his undertaking to make title to so much of the lot as complainant owns under his contract of purchase.

The third assignment is general, and not recognized in our practice.

The fourth, that the matter is *res adjudicata* if not defeated by the charges of fraud and mistake, is by the allegation of a promise to pay.

The fifth, that the statutes of limitations of three, six and ten years bar complainant's claim is overruled by the act of the General Assembly of 1865, chapter 10, section 3, Code, section 2762*b*, as follows: "If at any time any cause of action shall accrue against any person who shall be out of this State, the action may be commenced within the time limited therefor after such persons shall have come into the State, and after the cause of action shall have accrued, if the person against whom it has accrued shall be absent from or reside out of the State the time of his absence or residence out of the State shall not be taken as any part of the time limited for the commencement of the action."

The terms are broad and comprehensive, and embrace those persons who are temporarily absent, as well as those who are non-residents, and make no distinction between those who are non-resident of the State by removal therefrom, and those who have always been so. So that in the present case no time had commenced to run against complainant, though his cause of action had existed for several years, and he might at any time as he has done by this bill, commence his suit by attachment.

The sixth, that there was no consideration for the promises is in the nature of an answer, denying a positive allegation of the bill.

The seventh is a repetition of the fifth, relying on the statutes of limitation.

Affirm decree, confirm report and remand for further proceedings.

WILLIAM ALBRIGHT *v.* R. M. RADER.

LUNATICS. *Inquisition in county court. Proceedings.* Where the estate of the lunatic does not exceed five hundred dollars, the county court has exclusive jurisdiction. If it exceeds five hundred, the jurisdiction of the chancery and county court is concurrent, and in such cases the latter must conform to the rules and regulations laid down for the conduct of similar business in the chancery court as far as practicable. Code, construed, sections, 3681, 3692, 3695, 3696, 4196.

FROM GREENE.

Appeal in error from the County Court of Greene county.

H. H. INGERSOLL for Albright.

MCKEE & ARMITAGE for Rader.

DEADERICK, C. J., delivered the opinion of the court.

This proceeding was instituted in the county court of Greene county, at the December term, 1882, upon

the application of plaintiff, Albright, to have the said Rader declared a lunatic. A writ of inquisition was ordered by the court and issued to the sheriff of the county, commanding him to summon twelve jurors to enquire whether defendant, Rader, is a lunatic or of unsound mind, and incapable of governing himself and his property, and to report what property he has, and as to his family, and the names and ages of his wife and children, and it directs that the sheriff shall appoint the time and place for making such inquisition and return the same to the next term of said court. The sheriff returned the writ executed on December 27, 1882. On January 3, 1883, the jury made their report, finding that said Rader is of unsound mind, and has not sufficient capacity for the government of himself and property. They also find that said Rader has about 150 acres of land worth about $1,600; two horses worth $175; a wagon worth $25, and about $723 in money; that he has a wife and nine children, whose names and ages are given.

The report was examined and confirmed by the court by its chairman, and ordered to be recorded, and Albright was appointed guardian, who gave bond and was qualified. From this judgment rendered on the 3d of January, the defendant prayed an appeal to this court on January 5th, and having given bond with security the same was allowed.

The Referees have reported recommending the reversal of the judgment and the dismissal of the proceedings, and Albright has excepted.

By statute jurisdiction over the persons and estates

of idiots, lunatics and other persons of unsound mind, is entrusted to the county and chancery courts: Code, sec. 3681. The chancery court, however, has jurisdiction only in cases where the value of the estate exceeds $500: Code, sec. 3692. And in such cases the application must be made by petition, and the fact that the estate exceeds $500 in value must be therein stated, and bond and security for costs and damages must be given, and the defendant must be served with a copy of the petition and with notice of the time and place of holding the inquisition, at least five days previous thereto, and the clerk and master, or his deputy, shall be present and preside over the deliberations of the jury and receive their verdict: Code, secs. 3695, 3696. Other provisions by subsequent sections are made for the conduct of the trial, the ascertainment of the value of the estate and the entry of the decree or judgment.

Where the estate does not exceed $500 in value the county court has exclusive jurisdiction, and less formality is required in the proceedings. But in cases in which the estate exceeds $500 the jurisdiction is concurrent, and in such cases the county court must conform to the rules and regulations laid down for the conduct of similar business in the chancery court as far as practicable: Code, sec. 4196.

It was practicable to file a petition stating the value of the estate, and to give notice of the time and place of holding the inquisition, and to follow the other directions of the statute in respect to the procedure in the chancery court. None of these things

were done, and it was essential to the jurisdiction of the person that notice of the proceeding should be given. The record does not disclose that defendant had any notice of the proceeding until after the final order in the cause, nor until he prayed his appeal. This is not such an appearance as would waive the necessity of the formal notice required by the statute, and without such notice the judgment or decree would be void, and the defendant may have it reversed by appeal: 4 Baxt., 81; 4 Hum., 273.

The report of the Referees recommending a reversal of the decree or judgment and dismissal of the proceeding is approved, and the report will be confirmed and the proceeding dismissed at the costs of Albright.

SALLIE E. HOWARD *v.* H. W. MASSENGALE *et al.*

1. TITLE. *Common source.* It is only necessary for a plaintiff in ejectment to deraign his title from the person under whom it is proven the defendant claims.

2. EJECTMENT BILL. *Outstanding title.* The outstanding title, which will defeat a plaintiff in ejectment, must be a present, subsisting, operative and available title, not one reverted, abandoned or barred.

3. TITLE BY ESTOPPEL. A made deed of conveyance to C, reciting therein that he had previously conveyed same land to B, who had conveyed it to C; B had just before given C a statement in writing that he had given or deeded the land to C. Neither deed was registered, nor was there any other proof of the existence of either. *Held*, that B and A were both estopped to deny title in C, and that C would therefore recover in equity against persons not claiming under B, but by title adverse to his.

4. IMPROVEMENTS. *Who entitled to. Measure of value.* Constructive notice by registration of adverse title will not defeat claim for improvements by party holding under color of title, without actual knowledge of registered title. Improver is entftled to full value of betterments at date of surrender or sale, to be ascertained by report, or to relative value to be shown by report and sale, at the election of the title holder.

FROM HAMILTON.

Appeal from the Chancery Court at Chattanooga. W. M. BRADFORD, Ch.

DODSON & MOON for complainant.

KEY & RICHMOND for defendants.

INGERSOLL, Sp. J., delivered the opinion of the court.

This is an ejectment bill to recover about six acres of land on Lookout Mountain, valuable as a summer resort. The answers of defendants rely upon title in themselves, want of title in complainant, and outstanding title in a third party. It is clearly proven that all parties claim title under one Foster, who is admitted to have been the owner in 1849. It is not necessary, therefore, for either party asserting title to deraign it from the State: 3 Head, 8, 468; 6 Baxt., 114; 2 Greenl. Ev., sec. 307.

The question for determination is, who has obtained Foster's title?

It appears that in 1851 two Georgians, defendant Massengale and Dr. Avery, father of complainant, engaged in business together in Chattanooga, and so continued for about two years, when Avery returned to

Georgia. They summered together two years on Lookout, in 1852 and 1853. In 1852 one Moody Burt, brother-in-law of Avery, spent a few days with the family on the mountain on a visit, at which time it is alleged that he bought the land from Foster, who then occupied it but removed from it to a house on the summit one-quarter of a mile distant, where he summered in 1853, Avery occupying the old house that year. In 1852 also, and shortly after Burt's visit, Massengale built a house and shed on the upper end of the lot and enclosed them with a fence, and occupied them every summer until 1862, when the improvements on the land were all destroyed; none were replaced, nor was the land occupied by any one until after the purchase by respondents in 1877. The evidence leaves it in doubt whether Massengale bought or leased the ground on which he built; one of complainant's witnesses—her mother—deposing that he built and occupied under lease or license from Burt, and the other, a former slave of Massengale, that he bought from Foster a part of the lot and always claimed it as his own as long as he lived there, recognizing Foster as the owner of the lower part of the lot. The asserted purchase gains credence from the fact that Massengale buried a brother and child on the lot within his enclosure; but the presumption from this fact is fully offset by the conspicuous absence of Massengale's testimony as to the manner of his holding, and character of his title, if he had any. His only declaration in writing in regard to it is to be found in the following recital in his deed December 28, 1877,

to defendant Graham, under whom all defendants claim title: "I bought this tract of land in the year 1851, and had warranty deed from George D. Foster, having paid him the sum of $500 in full. This deed was lost during the war. I lived on said land eleven years, and have had peaceable possession of the same for twenty-six years."

His deposition to that effect would have resolved all doubt on this point, and possibly, with the evidence offered by complainant, would have vested him with title by seven years occupation under color. Defendants insist that complainant, having introduced this deed of Massengale to Graham, is bound by all its recitals; and thus is established against her the conveyance by Foster to Massengale in 1851, a year before the alleged purchase of Burt. We know of no such rule of evidence, but do recognize as correct the rule stated on the previous page of brief for defendants: Recitals in a deed are not evidence of the fact, when the fact requires proof, unless made so by statute. Complainant offered a deed to show the admission of Massengale that he claimed under Foster, which some of the answers had denied. No rule of evidence binds the party offering the admissions of his adversary to all he said at the time as truth. The fact requiring proof here is the conveyance by Foster to Massengale. The recital in the deed of Massengale to Graham is not evidence of the truth of his claim to title any more than would be an oral declaration to the same effect.

Failing to prove even color of title in Massengale,

during his occupation, defendants have failed to establish title in themselves. The ten years of occupation under claim of title by him matured only a defensive, possessory right, which after fifteen years was entirely gone from him and not transferable to Graham by the deed he made in 1877. Defendants, according to the record, have no title to the land in controversy. Has complainant?

In proof of her title she produces the deed of Foster of date, April 14, 1873, duly acknowleged and registered same day, conveying to her the land claimed in the bill. No one was then in possession of the same, and the objection of champerty is unavailing. So far as appears in this record, this was the first deed to this land registered after that to Foster, in 1849.

The description of the land, as proven by the surveyor, leaves no room for doubt or mistake as to the identity with that sued for. This sufficient deed of conveyance, duly acknowledged and registered, from the recognized owner to the complainant vests her with title to the land, unless there is something infirmative in it or in the proof *aliunde* in the record.

After a preamble reciting the purchase by Foster of the land and a description thereof the deed proceeds: "And whereas, the said Whiteside, Glass and Rogers conveyed the same to me by deed, bearing date in 1849, which was registered in book I, in the register's office of Hamilton county, which book has been lost, or cannot be found, and the said deed to me has also been lost; and whereas, I sold and con-

veyed said land to Moody Burt, of Columbia county, and the said Moody Burt conveyed said land to Sallie A. Avery, now Sallie A. Howard, wife of Wm. H. Howard, of DeKalb county, Georgia; now, therefore, I do hereby transfer and convey said land in consideration of the premises, to the said Sallie A. Howard, her heirs and assigns, and vest the title to the same in fee to her." Then follow covenants of title, of right to convey, against encumbrance, and of general warranty.

Upon these recitals in complainant's deed, defendants predicate their defenses of want of title in complainant, and outstanding title in Burt, either of which is as effectual to defeat complainant as title in the defendants.

The reason or motive for this unusual mode of conveyance does not appear in proof, neither complainant nor Foster deposing in the case. The Referees attach much significance to this omission, especially as they infer from the record that Foster was within the jurisdiction of the court within the month next preceding the hearing of the cause in the chancery court.

A careful examination of the transcript satisfies us that this inference is based on the misprision of the clerk, or of the register, in copying the deed and acknowledgement of Foster to complainant, in 1873, thus showing the acknowledgement by him in Hamilton county in 1883, only twenty days before the decree, while the original in the record shows it to have been in 1873, a mistake of ten years. Whether Foster is dead or alive is not inferable from anything in the

record. Burt and complainant's father are dead. If Foster were alive, he could prove whether he made a deed to Burt; and if he did, why he made this one to complainant, but not, as is fairly inferable, whether Burt made one to complainant. His deed to complainant shows conclusively as to him that he had made the deed to Burt; and this is the only fact of importance to defendants that his evidence would establish. Nothing unfavorable to complainant, therefore, can be inferred from the absence of Foster's deposition. Complainant was only six years old at the date of the alleged conveyance to Burt, and but thirteen at the alleged date of the gift by Burt to her in 1859. Of the first deed she could not be presumed to have any knowledge. Of the latter she may have known, or may not. Whether she did or not, her deposition would have shown. From its absence it is fairly inferable she had no personal knowledge of the alleged deed to her by her uncle, Moody Burt, and we must look elsewhere for proof of it. Why Foster made the deed to complainant, though not so material, is surely a pertinent inquiry. The reasons for it appear in the record with almost as much perspicuity as his deposition could give. His own deed and the record-book, wherein it was registered, was lost; so was his deed to Burt, and also Burt's deed to complainant, if he ever made one. Complainant had absolutely no muniment of title. He believed that she had the right to one, or he would never have made a deed with covenants to her. He was confirmed in this belief by a paper from Burt,

dated within the month preceding this deed, upon which he probably acted, and which is as follows:

"GEORGIA, COLUMBIA COUNTY.

I, Moody Burt, of the State and county above written, do certify that on or about January, 1859, I deeded or gave a certain tract of land on Lookout Mountain, in the State of Tennessee. Said lot of land contained six acres, more or less. The above lot of land I purchased of Geo. D. Foster, in 1852. The above named lot of land I, as above stated, gave unto Sallie A. Avery, eldest daughter of Dr. James C. Avery, of DeKalb county, Georgia, who has since intermarried Wm. H. Howard, of Richmond county, Georgia.

This March 17, 1873. MOODY BURT.

JAMES M. LUKE, Acting J. P.

Witness: A. J. AVERY,
B. R. REED.

This paper was objected to as evidence by defendants because incompetent and irrelevant. Being duly proven it was competent; and being the declaration admission of the person in whom was the alleged outstanding title in regard to the very land in controversy, as we have no doubt, it was relevant and admissible. The question in the case is, what is the effect of this paper and the deed aforesaid? There is no direct evidence to support the statements of the papers that Foster had conveyed to Burt and Burt to complainant. The only witness in regard to such supposed papers is the mother of complainant, and she never saw either of them. What, then, is the legal consequence of the admitted conveyance by Foster to Burt; the admission by Burt that he had given or deeded the land to complainant, and the conveyance therefore by Foster to her of the title?

Defendants insist that the title is outstanding in Burt, complainant, that equitably, if not legally, it is

vested in her, and therefore she can recover in this suit. Here lies the kernel of the controversy.

From the record it is apparent that the title is either in Foster, Burt or complainant. Complainant in her bill as well as by claiming under the deed of 1873, admits that Foster's title has been conveyed to Burt; she alleges that Burt had conveyed it to her, no deed from him to her is shown ever to have been in existence. This leaves the legal title in Burt. But he could not maintain ejectment against defendants, for he has no available proof of his title against them; and, moreover, he admits that the title had passed from him before Graham bought of Massengale. Foster could not maintain ejectment against them, because he had conveyed to two different persons before their purchase. Is complainant also to fail because the strict legal title appears to be in Burt?

The defense of outstanding title is not favored in our courts, nor generally in America. To defeat an action of ejectment at law even, the outstanding title must be a present, subsisting, operative and available title, not one reverted, barred or abandoned: *Peck* v. *Carmichael*, 9 Yer., 325; *Dickinson* v. *Collins*, 1 Swan, 516; *Self* v. *Haun*, manuscript opinion, Knoxville, 187—; *Salter* v. *Williams*, 10 Ga., 186; *Jackson* v. *Hudson*, 3 Johns., 375; *Foster* v. *Joice*, 3 Wash. C. C. Rep., 498.

Such a defense should receive still less favor in equity than at law; and where it appears that the probable holder of the legal title cannot, for lack of competent proof or other sufficient obstacle recover in

ejectment, equity will be slow to deny relief to the equitable owner.

Accordingly it has been ruled in many reported cases, and with good reason, that where a vendee under an unregistered deed has, without reconveying title, surrendered, cancelled or destroyed his deed, and consented that his vendor might convey the title to another person, and the same has therefore been done, such second vendee will thus obtain a good title, though in strictness the title had passed out of the vendor by the first conveyance and had never returned to him. For in such case, the deed to the second vendee being registered, the title would *prima facie* be in him; and this title the vendor would be estopped from denying by the deed itself, and the first vendee by his act in surrendering or cancelling his deed that the vendor might convey to another: *Commonwealth* v. *Dudley*, 10 Mass., 403; *Holbrook* v. *Terrell*, 9 Pick, 105; *Faulks* v. *Burns*, 2 N. J. Eq., 250; *Lawrence* v. *Stratton*, 6 Cush., 163; *et vide Trull* v. *Skinner*, 17 Pick, 213; 3 Washb. R. P., B. 3, ch. 4, sec. 2.

True, there is lacking in this case the surrender or cancellation of the first deed for the purpose of enabling the vendor to make conveyance to another person. But in lieu thereof is a written statement by the first vendee that he had deeded or given the land to another; and to that person the vendor therefore makes the second conveyance. The deeds of Foster to Burt, and of Burt to complainant, if they ever were executed are unrecorded and probably lost. If

they never were executed, then the recital thereof in Foster's deed to complainant is incorrect; and the title being in Foster in 1873 was conveyed to complainant. If the recitals are correct, then the title was already in complainant. But if Foster had made deed to Burt, but he had not made one to complainant, what is then the effect? Burt has given complainant the written statement, witnessed and acknowledged that he had deeded or given her the land; she exhibits that to Foster, who thereupon makes her the second deed. The loss of the deeds and the written statement of Burt for the benefit of complainant are the equivalent of a surrender or cancellation of Burt's deed. He certainly had abandoned his title or relinquished it in complainant's favor, and thus authorized Foster to make a muniment of title to complainant, as effectually as he could have done by surrender of his deed and direct request.

Obviously there is here no present, subsisting, operative and availiable title in Burt, not barred or abandoned, such as is required to defeat an action of ejectment. Whatever he has of title, legal or equitable, he is equitably estopped from setting up against Foster or complainant; and she is entitled to recover the land from the defendants, who have neither title nor possessory rights.

Respondents rely in their answers upon the plea of innocent purchasers, and ask allowance for betterments, placed upon the land by them respectively. Graham, from whom the present holders purchased, did not buy of Massengale until 1877, four years after complainant's deed from Foster was made and registered. He de-

poses, however, to his own good faith in the purchase, and to various circumstances, which corroborate his statement, and denies any knowledge of complainants title until about the time suit was brought. The sub-purchasers bought relying upon his title, and none appear to have had knowledge of complainant's title until suit was brought; but all bought and made their improvements in good faith. These improvements are worth many times the value of the land. Complainant ought not in equity to have the benefit of these expenditures for nought.

Had she relied upon her suit at law and recovered the land therein, it is probable respondents could only have recovered betterments, equal to rents, as provided by our statute: Code, secs. 3259–61.

But, fearing the infirmity of her title at law, she has appealed to equity to aid her in recovering the land. Having sought and obtained equity, she must now do equity. The claim of respondents for betterments is not defeated by the fact that complainant had a registered title. Constructive notice by registration of adverse title does not destroy this equity: Malone on Real Property Trials, 140 (note). They used ordinary prudence and precaution in their purchases; and, having improved the land under color of title, they are entitled to receive something for all betterments placed on the land before they had actual knowledge of complainant's title: 2 Pomeroy's Eq. Jur., sec. 1241. But to what extent? Full value? Or only the value of rents and profits? And how is the allowance for them to be measured, declared and enforced?

Previous to *Fisher* v. *Edington*, 12 Lea, 189, it had been the practice, and was by the bar generally thought to be the rule, to limit the allowance for betterments to the sum total of rents and profits. The reasons for this, and the danger to the title-holder from a different practice, are cogently expressed in the opinion of Judge Turney in that case. The equity of the occupants, however, was considered by a majority of the court to be so strong as to overcome these objections, and the full value of their betterments was decreed to them regardless of the limit of rents and profits. Here the case of the occupant defendants is equally meritorious. Lots ranging in value from forty to two hundred dollars, when vacant, and of no appreciable rental value, have, by these improvements, been increased in value until they are now probably worth from four hundred to three thousand dollars, and perhaps more. All of these improvements have been made in the past five years, and without knowledge of complainant's title; some of the most valuable of them are yet incomplete, their progress having been arrested by this suit. The builders and occupants have as yet received little or nothing from their outlay. To limit their allowance for betterments, by the amount of rents and profits, is practically a total denial of the very equity of their claim, *i. e.*, that complainant shall not take from them, without compensation, things of value, placed by them in good faith on her land, which now, because they are fixtures, necessarily inure to her benefit.

As in *Fisher* v *Edington*, so here the court is of

opinion that defendants should have the full value of their betterments. But to avoid the danger, so likely to result in any similar case, from an overestimate of their value, and a possible sacrifice at forced sale, at which the entire proceeds of sale might prove insufficient to satisfy the value of betterments, as they may have been estimated and decreed, whereby the title-holder would thus be *bettered* out of her entire estate, the report, to be made on this subject, should include a statement of the proportional value of the lot and improvements at date of surrender or of making the report, and complainant on the entering of the decree fixing these values should be allowed to elect as to each lot whether she will pay the decreed value of the betterments and taxes less rents to the respondents severally, and thus discharge their respective liens, or take her proportional part, according to the relative value of each lot and betterments thereon, of the entire proceeds of a sale of the same.

In case she should choose the latter method, then the value of rents less taxes paid by respondents respectively, will be deducted from the improvers shares and added to complainant's share of the proceeds.

The result is, that the decree of the chancellor is reversed, and the report of Referees set aside. The cause will be remanded for an account of rents, betterments and taxes, and for further proceedings according to this opinion. The entire costs of the cause will be paid one-half by complainant and one-half by the respondents.

R. E. & A. T. BERRY *v.* M. M. & L. WAGNER.

GRANT. *Entry-taker. Deputy.* An entry-taker is competent to make an entry for his deputy, and an entry made by the deputy in his own name, but under the direction of the principal, would not be void, but only voidable at the instance of another enterer before grant, and not by an enterer and grantee subsequent to the grant.

FROM JOHNSON.

Appeal from the Chancery Court at Taylorsville. H. C. SMITH, Ch.

BUTLER & DONNELLY and J. P. SMITH for complainants.

H. H. INGERSOLL and C. J. ST. JOHN for defendants.

COOPER, J., delivered the opinion of the court.

Bill filed July 9, 1883, to remove a cloud from the title of land. The chancellor overruled a demurrer to the bill, and the Referees report that his decree should be affirmed. The defendants except.

The complainants claim the whole land, 4000 acres, under a grant from the State issued to them April 7, 1883, founded upon an entry made April 15, 1882. They also claim the "principal part" of 100 acres of the same land under a grant from the State of May 10, 1834, based upon an entry made October 22, 1830, and *mesne* conveyances to them. The defendants derive their title by grant from the State issued in

October, 1837, to A. C. Parks and M. M. Wagner, based upon an entry of August 10, 1830, in their names. On November 12, 1858, Parks conveyed his interest in the land, describing it as an undivided half, to M. M. Wagner and M. F. Wagner. M. F. Wagner has since died leaving the defendant, L. Wagner, as his only heir. The land in controversy, the bill says, except a very small portion of the 100 acre grant, is wild, uncleared mountain land, "and no one has ever had any actual possession thereof by enclosure or otherwise."

Upon the foregoing facts, the defendants having the oldest entry to the 100 acres mentioned, and the oldest entry and grant to the residue of the 4000 acres, would have the better title under our law. But the bill alleges that the entry, under which the defendants claim, was made by A. C. Parks, one of the enterers and grantees, in proper person and in his own handwriting, M. M. Wagner, his co-enterer and co-grantee, not being present, and that Parks was at that time the deputy entry-taker of the county. The complainants insist that these facts rendered the entry, and the grant issued thereon, void. The demurrer to the bill is put upon the ground that the complainants cannot avail themselves of the supposed fraud perpetrated by Parks and Wagner in obtaining their grant, the State alone having the right to complain.

The act of North Carolina of 1777, chapter 1, which has been held to be in force in this State, provides by its 16th section that if any entry-taker desires to make an entry of land in his own name, such

entry shall be made in its proper place before a justice of the peace of the county, who shall return the entry to the county court at their next sitting, and the court shall insert the entry. The section adds: "And every entry made by or for such entry-taker in any other manner than is herein directed shall be illegal and void, and any other person may enter, survey and obtain a grant for the same." In *Egnew* v. *Cochrane*, 2 Head, 320, it was held that this section of the statute was probably in force in this State, but, if it was not, that an entry made by the entry-taker in his own name was against public policy and illegal; and therefore that an older enterer of the same land had the better right, and could in equity divest out of the entry-takers the legal title acquired by a grant issued to him on his own entry, and have the same vested in himself. The effect of such an entry upon the grant issued thereon, and whether a younger enterer could impeach the grant, were questions not passed upon but expressly reserved.

In *Rainey* v. *Aydelotte*, 4 Heis., 122, it was held that entries of land made by an entry-taker in his books in his own name were so far void, under the act of 1777, as to subsequent enterers, that the latter would be entitled to a *mandamus* to a succeeding entry-taker to compel him to insert the subsequent entries, notwithstanding the previous entries. No grants had issued on the earlier entries, and no question was therefore made or determined in relation to the validity or invalidity of such grants as against a subsequent enterer.

The case of *Sampson* v. *Galloway*, 5 Heis., 275, holds that an entry-taker, who has made entries in his office in his own name and obtained grants thereon, cannot come into equity by a bill *quia timet* to enjoin other persons from appropriating the lands by grant, but will be repelled from the court because of his illegal conduct, and left to his remedy at law, if he have any. In this case it appeared that complainant's son was a deputy entry-taker under his father and his father's successor, and, while a deputy, made entries in his own name which were transferred to his father. The court did not decide whether the entries of the deputy would fall within the statute, or be against public policy, nor what would be the effect of grants issued thereon as against subsequent enterers.

These cases do settle that the entry of the land by the entry-taker himself in his own name will not prevent third persons from acquiring a better right to the land by subsequent entry before grant. They do not determine whether a grant to the entry-taker on his own entry is to be regarded as void and open to a collateral attack, or only voidable at the suit of the party aggrieved, nor whether one holding under a younger entry and grant can be a party aggrieved, entitled to call in question the prior grant of the land to the entry-taker. These are the points in effect raised by demurrer in the present case, although not in so many words. For the State alone has the right to complain unless the grant is void, or voidable at the instance of a subsequent enterer and grantee.

The general rule is that a grant, being a matter of

record, cannot be impeached and declared void in a collateral proceeding not between the parties thereto, except by some evidence of like grade and dignity, or by facts apparent on the face of the grant. And therefore in ejectment between adverse claimants of land, evidence is not admissible to show that the grant upon which the interest of one of the parties depends was obtained by fraud: *Smith* v. *Winter*, 1 Tenn., 230; *Curle* v. *Barrel*, 2 Sneed, 62. And in the last of these cases the court said: "A person claiming title in virtue of a subsequent entry and grant, with notice of a prior grant which remains in force, has no such interest as will entitle him to litigate the right of the former grantee."

Entries and grants are void, and may be resisted on a trial in ejectment, wherever there is a want of property in the grantor, or want of power in the officers appointed by the government to receive the entries or issue the grants: *Polk* v. *Windel*, 2 Tenn., 433. It was so held where the entry and grant were of lands reserved for the Indians before these lands were opened for entry: *McLemore* v. *Wright*, 2 Yer. 326. And where they were of lands in one district by an entry-taker only authorized to enter lands in another district: *Crutchfield* v. *Hammock*, 4 Hum., 203. And where they were of lands entered in an office which is vacant or closed by law: *Roach* v. *Boyd*, 1 Sneed, 135; *Woodfolk* v. *Nall*, 2 Sneed, 674.

The grant under which the defendants claim is not void for anything appearing on its face. It can

only be avoided by extrinsic proof. If that proof merely undertakes to show fraud upon the part of the grantee against the State, the authorities are uniform that the State alone can complain. A prior enterer, as in *Egnew* v. *Cochrane*, might divest the legal title of the grantee, without avoiding the grant. But an enterer and grantee subsequent to the grant "would have no such interest as will entitle him to litigate the right of the former grantee." Does the extrinsic proof tendered by the averments of the bill bring the case within any of the exceptions which authorize the going behind the grant? These exceptions, as we have seen, are when there is a want of property in the grantor, or want of power in the officers appointed by the government to receive the entry or issue the grant. There is no want of property on the part of the grantor, for the State had an undoubted title to the land granted. There was no want of power in the officers to receive the entry of property made, or issue the grant, for the entry-taker was authorized to receive entries of the land, and the Governor was authorized to issue grants therefor. The entry was allowed by law, that is, the entry-taker might make an entry in his office in a prescribed mode, and was at most irregularly and illegally made. By reason of that irregularity and illegality the land was still open to entry by others until the State condoned the fraud by issuing the grant. The act of 1777, it will be remembered, expressly empowers the entry-taker to enter lands in his office provided he pursues the mode prescribed. The irregularity was rather of form than

substance. If the State issued a grant before any third person had acquired an entry, the State alone could complain. But why should the State complain merely because there was an erroneous mode of entry, every other requisite of the law having been complied with? Influenced no doubt by these considerations, the Supreme Court of North Carolina, construing this very act of 1777, decided that the grant issued to an entry-taker upon his own entry is not void, but only voidable: *Tyrrell* v. *Mooney*, 1 Murph., 401.

This court has reached the same conclusion in construing an analogous statute. The act of 1819, chapter 1, section 29, declares that a survey which includes more than one-tenth more land than called for by the entry is a fraud upon the State, and the surveyor who makes such a survey is pronounced guilty of a misdemeanor, and indictable therefor. The act further declares that the surplus land in such survey, over and above one-tenth more than called for by the entry, shall be deemed vacant land and subject to entry. That act, like the one before us, is silent as to the effect of the error condemned when it has passed into a grant. This court held that prior to the issuance of the grant any third person might, by entering the excess of land, obtain a valid title therefor; but that after the land had been granted, no third person having intervened, the State alone could complain: *Webb* v. *Haley*, 7 Baxt., 600. The principle which underlies the decision is the same already quoted from *Curle* v. *Barrell*: "A person claiming title in virtue of a subsequent entry and grant, with

notice of a prior grant which remains in force, has no such interest as will entitle him to litigate the right of the former grantee."

If there be any doubt of the correctness of the foregoing conclusion in reference to a grant issued to an entry-taker upon an entry made by him in his own name, there can be none as to its correctness in relation to a grant to a deputy entry-taker upon an entry made by him in his own name. For the doubt would grow out of the language of the act of 1777, and this act is in terms limited to the entry-taker. It provides a mode by which the entry-taker may make entries of land, like other citizens, without acting in his own case. In like manner, the statute which provides for the probate of deeds made by or to the clerk of the county court is in terms limited to the clerk: Rev. Code, section 2069. And there is manifestly no reason in either case why the statute should extend to deputies, for the principal officers might always act where the deputy was interested as an individual. If the deputy entry-taker desired to make an entry, the entry-taker would be competent to insert it in his books. And the presumption of law would be that he had made the entry even if written by the deputy: *Ament* v. *Brennan*, 1 Tenn. Ch., 431. An entry by the deputy himself in his own name, not under the direction of the principal, would not fall within the act of 1777, but would merely be open to the objection of being against public policy. The entry would not be void, but voidable at the instance of any party aggrieved, and

the grant issued thereon could only be impeached by the State, or, as in *Egnew* v. *Cochrane*, by a prior enterer, or by a party acquiring a superior equitable or legal title.

Upon these principles it is clear that the complainants have no right under their entry and grant of 1882, 1883, to impeach the grant under which the defendants claim, and to that extent the demurrer is well taken. It is otherwise, however, in so far as the complainants claim under the small grant. Both the entry in which that grant is founded, and the grant itself ante-date the grant of the defendants. In an action of ejectment between the parties, or other action turning upon title, the defendants could only succeed on the strength of their prior entry. But that entry would be open to the objection, upon the facts of the bill, that it was made in violation of public policy, and the land would remain open to entry and grant until the State had issued its grant founded on the first entry. The grant would not override the intervening rights. The complainants, however, could only claim against the entry to the extent of the individual half interest of Parks, for entry would be good as to Wagner, a third person, for whom the deputy might act.

Strictly the demurrer being bad in part should be altogether overruled. But we have made an exception where the decision would greatly narrow the litigation, and is manifestly for the interest of the parties: *Riddle* v. *Motley*, 1 Lea, 468.

The decree below will be reversed, the Referees'

report set aside, and a decree entered here in accordance with this opinion. The complainants will pay the costs of this court. The residue of the costs will abide the event of the litigation. Cause Remanded.

N. R. PARMELEE *v.* TENNESSEE & SEQUATCHIE VALLEY RAILROAD COMPANY.

1. CHANCERY PLEADINGS AND PRACTICE. *Plea of former suit.* The proper proof to support a plea of a former suit pending is a certified copy of the record.

2. SAME. *Mechanic's lien.* To a bill filed to enforce an alleged mechanic's lien for work done, a plea of a former suit pending is insufficient which embodies in it a copy of the former bill showing that it was only for the collection of the debt.

3. SAME. *Same.* A plea may be good as to part of a bill although pleaded to the whole bill, but if the part cannot be separated, the plea should be overruled altogether, in which case the defendant is entitled to answer.

4. SAME. *Same.* A plea of a former suit pending may be filed after a continuance of the cause with leave to the defendant to make defense to the bill and the attachment sued out thereon.

5. SAME. *Same.* An objection to a plea of a former suit pending, that it was not filed in time, cannot be made in this court if not first made in the court below.

FROM CUMBERLAND.

Appeal from the Chancery Court at Crossville. W. M. BRADFORD, Ch.

SNODGRASS & CLARK for complainant.

JOHN R. NEAL and WHEELER & MARSHALL for defendants.

COOPER, J., delivered the opinion of the court.

Bill to enforce an alleged mechanic's lien on the defendant railroad for the erection of trestle work. The defendant put in a plea of former suit pending, the sufficiency of which was sustained, and, upon issue joined, its truth found by the chancellor. From the consequent decree dismissing his bill the complainant appealed. The Referees report that the issue of fact on the plea should have been found for the complainant, and that he is therefore entitled to a decree. The defendant excepts.

The proof in support of the plea of a former suit pending is a certified copy of the record, and as there is no such copy in the transcript we concur with the Referees in the conclusion that the issue of fact should have been found against the truth of the plea. But we differ with the chancellor and Referees in thinking the plea to be sufficient. The present bill is filed to enforce an alleged mechanic's lien for work done. The former bill, which is made an exhibit to the plea, and therefore embodied in it, was only to collect the debt for the work done. The two suits were consequently, as shown on the face of the plea, not for the same object and purpose. The plea was sufficient to so much of the bill as sought merely the recovery of the complainants debt, but not to that part of the bill seeking the enforcement of a mechanic's lien for the security of the debt. At most it could only

be allowed to stand as a defense to the one part, and overruled as to the other. A plea, unlike a general demurrer, may be good as to a part of a bill, although pleaded to the whole bill: *Searight* v. *Payne*, 1 Tenn. Ch., 186; Sto. Eq. Pl., sec. 692. But it would be difficult to separate the demand from the alleged lien. If two bills be found in the same court for the same purpose, the rule is to allow that bill to proceed which embraces the most matter of litigation: *Croft* v. *Wortley*, 1 Ch. Cas., 241; *Rigby* v. *Strangways*, 2 Phill., 175. The same rule should be applied where the two bills have been filed in different courts of the same government, having concurrent jurisdiction: *Moore* v. *Holt*, 3 Tenn. Ch., 141; *Schuehle* v. *Reiman*, 86 N. Y., 273. The present bill embracing an additional matter of litigation, the proper course was to have overruled the plea altogether, either party being at liberty to bring the result of the former litigation, if first tried, before the court by supplemental bill, and the complainant being subject to the control of the court in the matter of costs for unnecessary litigation: *Moore* v. *Holt*, 3 Tenn. Ch., 141. Where a plea is held to be insufficient and overruled, the defendant is of right entitled to answer: Code, sec. 4395.

The defendant's counsel suggests that there being no mechanic's lien for the trestle work erected for the track of a railway, the present suit is substantially for the debt alone, and the plea therefore good. But the complainant has a right to have that question tried upon a proper issue, and no such issue is made in this case by motion to dismiss, demurrer, plea or answer.

It is said in the Referees' report that the plea, being in the nature of a plea in abatement, came too late after the continuance shown by the record. If so, there was no issue to try, and the case must be remanded for defense on the merits. The plea, however, although for some purposes treated as a plea in abatement, seems in other respects to be treated as a plea in bar: *Green v. Neal*, 2 Heis., 217, 219. Be this as it may, no objection was made in the court below to the plea that it was not filed in time. And we think no objection could properly have been made. The subpœna to answer was executed on the defendant just five days before the commencement of the term of court to which it was returnable. On the day after the opening of the court, an entry of the record appears showing that the parties appeared, and upon application of the defendant by attorney, "the defendant has until the next term of this court to make defense to said bill of complaint, and the attachment in this cause." The continuance was not general, nor equivalent to a continuance to plead and try at law, but with the express reservation of the right to make defense, plainly meaning any defense to bill or attachment.

The report of the Referees will be set aside, the chancellor's decrees reversed, the plea declared insufficient, and the cause remanded for further proceedings, the defendant being declared entitled to file an answer. The defendant will pay the costs of this court. The costs of the court below to be subject to the orders of the chancellor.

EMILINE JOHNSON *v.* THOMAS TOMLINSON *et al.*

CHANCERY PRACTICE. *Decrees upon order pro confesso.* A decree settling the rights of the parties, founded upon an order *pro confesso* after personal service upon a party *sui juris*, is a final decree, and cannot be set aside at a subsequent term, except upon proper proceedings instituted for that purpose. Code construed, sections 3476, 3824, 3829, 4369, 4371, 4375, 4377, 4379.

FROM HAWKINS.

Appeal from the Chancery Court at Rogersville. H. C. SMITH, Ch.

F. M. FULKERSON for complainant.

SHIELDS & SHIELDS for defendants.

FREEMAN, J., delivered the opinion of the court.

This bill is filed to enjoin a judgment rendered by a justice of the peace in favor of Tomlinson on December 31, 1870, for $157.08.

Complainant charges that she sued Tomlinson on an award rendered by certain arbitrators; that the case was continued by her to a day fixed, but on that day, "from sickness and other causes," she failed to attend with her proof, and the justice entered a judgment against her claim, and giving judgment in favor of Tomlinson, on a set-off for the sum stated. She charges that she is not aware of any debt due by her to said Tomlinson, therefore she says, the judgment is unjust.

It is then claimed the judgment is void, because nothing having been found for plaintiff, no judgment as the law then stood could have been properly rendered against her or the claim of set-off, under the case of *Brazelton* v. *Nashville & Chattanooga Railroad Company*, 3 Head, 570. On these charges she asks an injunction, and prays the judgment be declared void.

The bill was filed September 22, 1875, and process regularly executed on the defendant a few days afterwards. He failed to answer, and at May term, 1875, of the chancery court, the bill was taken for confessed, reciting the necessary facts to authorize it, and then a regular and final decree entered, based on the admission of the charges of the bill, reciting them, and the judgment perpetually enjoined, taxing defendant with the costs, and awarding an execution.

At November term, the second day of the month, there appears the following order of the court: "In this cause, for satisfactory reasons appearing to the court, the court is pleased to order and decree that the judgment and decree *pro confesso* heretofore entered against the defendant be vacated and set aside, and that defendant have three months in which to make defense." An answer was filed by the defendant, proof taken, and a decree against him, from which he appealed at October term, 1883.

The Referees report that this decree was final and complete, and being unappealed from was conclusive, the litigation ended and no case in court at the time the chancellor set it aside, consequently his action was void and of no effect.

We can see no answer to this unless we hold that a decree in a case like this, where the defendant is *sui juris*, and not within any of the exceptions provided for by our law, when taken on an order *prò confesso*, regularly entered, is not final, but may be opened on satisfactory reasons to the chancellor, reversed and set aside, as if it had not been made.

By Code, section 4369, a bill may be taken for confessed, first, when being duly served with process as already provided, the defendant fails to answer or demur by the time fixed by law. Second, when an order for his appearance has been duly made and published as prescribed, etc. By section 4370, in these two cases, the cause may be set for hearing at the return term of the process, etc. The decree in this case shows this was done, and the case finally disposed of.

This certainly ended the case. The decree setting aside the former one does not purport to have been on writ of error *coram nobis*, or any regular proceeding instituted for such purpose, nor because of agreement of counsel, but only because the chancellor, for satisfactory reasons, saw proper to treat the case as still subject to his control, and open for his action. If such action may be taken at the next succeeding term, it may be taken any number of years after, as there is no limitation in case of service of process, as there is in other cases specially provided for by other sections of the Code in this connection: Sections 3476, 4377, 4378, 4379.

If the decree had been merely interlocutory as in

the case of *Morris* v. *Richardson*, 11 Hum., 391, it could have been reached by an appeal from the final decree, but in this case it was final and complete. In the case of *Planters' Bank* v. *Fowlkes*, 4 Sneed, it was held that while the court had full power to execute its decrees, and grant a writ of possession to effectuate a sale made, yet if the court had finally disposed of the case without such writ granted, the court had lost all control over the case and the party would be compelled to resort to a court of law to obtain possession of land purchased: See also *Vanbibber* v. *Sawyers*, 10 Hum., 81.

But section 5718, new Code by Milliken & Vertrees, 4375 old, seems conclusive of this question in connection with sections 4370 and 4371, old Code, sections 5113, 5114, new Code. These sections provide in a case like the present, the cause may be *set for hearing at the return term* of the process; and that when the order *pro confesso* is lawfully had, the allegations in the bill are taken as admitted, except in the case of infant defendants, persons of unsound mind, etc. These provisions can only mean that when the process has been served and the defendant fails to answer, then on order *pro confesso* taken, there may be at the option of complainant a regular and legal trial of the cause or bill, and such order, the allegations of the bill thus confessed, to be taken at the time, and so admitted to be by the defendant. This is to be the evidence on that trial thus provided for. Before this trial and a final decree had on it, a provision is made, however, for defendant, setting aside the order *pro*

confesso alone. The section reads: "A defendant who has been served with process—as in this case—may, at any time before *final* decree, *on* good cause shown, obtain from the chancellor or clerk and master, an order setting aside the decree *pro confesso*, upon filing a full and sufficient answer and payment of costs."

This section gives the right, on good cause shown, for the chancellor or the master to set aside the decree *pro confesso*, but it is evident this refers simply to what we mean by the order *pro confesso* and not a decree, after the cause has been set for hearing and heard, and a final decree entered on that hearing. This is seen from the fact that the decree here spoken of is one the master may make as well as the chancellor, and this can only be the simple order *pro confesso*. But the other provision, that this can only be done at *any* time before final decree puts it beyond question. If a final decree has been entered and court adjourned, after regular hearing as provided, then the case has passed beyond the control of the master or chancellor. This must be so, or else we must interpolate on the statute words that would make it contradictory of itself, and make it read "at any time before final decree, and also at any time after such decree on good cause shown." This would be contradictory, because the settled rule of construction is that an affirmative provision implies the negative, and forbids its opposite to be done, and so the affirmative, that "it shall be done at any time before final decree," necessarily implies that after that it cannot be done. And so the statute would in the

first clause forbid, and the next permit. The compilers of the Code have never in the same section, been in the habit of using such language, and no principle demands such an interpolation by construction. Why should not this be so? What essential element of difference is there in such a decree, and any other final decree in which a case has been disposed of on admission of the defendant, in view of the section of the Code quoted making the order *pro confesso* equivalent to an admission of the allegations of the bill. If the party had answered and so admitted them, there could be no question that a decree on bill and answer would be beyond the control of the court after adjournment at the term. The statute has made the order *pro confesso* equivalent to this, and authorized the case to be set for trial on this as the sole necessary evidence in favor of complainant, and as admission by law of the facts charged, so that there is not only a decree by default, which takes the place of an answer confirming their truth, but then a trial without an answer, and a final decree on that trial, the defendant cannot complain. The court has jurisdiction of the subject-matter, and by service of process on him of his person. If he fail to answer it is his own fault and negligence. If sick his counsel could always get time to answer. If he fails to employ counsel he is negligent. If without any fault on his part, then a writ of error *coram nobis* is a remedy provided by section 3829, new Code, when "the party is prevented by disability from showing or correcting the error, or in which he was prevented from

making defense by surprise, accident, mistake or fraud *without* fault *on* his part."

So we have by the Code an affirmative provision that impliedly forbids setting aside a final decree by the court, and an express statutory remedy given, limited to a year by section 3824 new Code, and certainly these two provisions must be conclusive against the power exercised by the court in this case.

This limitation would be rendered inoperative entirely, if for the same or like causes the court could, on mere motion, or at any rate, without pursuing the remedy provided set aside its final decrees. There is no limitation as to time prescribed by any statute, and so it could be done, as we have said, at any time, this court having no power to enact a limitation when the Legislature has prescribed none.

The same conclusion was reached two years since at Nashville in an opinion by Judge McFarland, a rehearing was granted in that case, and the case decided on a different question, but that opinion on this question was not changed, but approved by a majority of the court refusing to allow the case to be decided on a contrary view, by Jones, Special Judge.

While it might be the court went beyond sound principle, perhaps, in the 4th Sneed case, at any rate to the verge of the law, as the writ of possession asked was but in the nature of an execution, and the court might well have said the case was still under its control for that purpose, that is, effectuating its decree by any process appropriate to that end; yet that view would not sustain the action here, where instead of

executing, the decree is annulled and set aside. This is the duty of a revising court, or the same court under a revisory proceeding, as writ of error *coram nobis* as provided by statute, and within the time prescribed.

The result is the report of the Referees is approved, with costs of this and court below.

MAYOR AND ALDERMEN OF CHATTANOOGA *v.* JOHN GEILER.

1. CORPORATIONS, MUNICIPAL. The power of ascertaining and establishing grades of streets may, by ordinance or vote, be vested in the officers or agents of a municipal corporation, and it will be bound by the acts of such officer or agent in pursuance of such authority. Code construed, sections 1392, 1394.

2. SAME. *Measure of damages.* Damages to private property by change of the grade of streets, may be mitigated by reason of benefits common to all property owners by the improvements.

FROM HAMILTON.

Appeal in error from the Circuit Court of Hamilton County. D. C. TREWHITT, J.

H. M. WILTSE for Chattanooga.

H. B. CASE and KEY & RICHMOND for Geiler.

DEADERICK, C. J., delivered the opinion of the court.

In 1881 Geiler sued the Mayor and Aldermen of the

city of Chattanooga, to recover damages done to his lot, No. 63, in the original plan of the city of Chattanooga, and the house thereon, by a change made in the grade of the streets, upon which said house and lot are situated.

The declaration contains two counts. The first count charges that the civil engineer of the city, being applied to by him, under the authority of the Mayor and Aldermen, in 1874, fixed and established the grade on Chestnut and Ninth streets, and surveyed the lot upon which plaintiff proposed to build, and established the grade of the street and side walk, adjacent thereto, and that in 1874 he expended $5,000 in building upon his lot, conforming to the grade thus established, and that in December, 1880, the grade was changed so as to throw the level of his floor some three feet lower than before, and below the level of the said streets and sidewalks, making it inaccessible and subject to inundation, etc. The second count avers that at the time plaintiff built his house, the grade of the streets upon which he built, being corner of Chestnut and Ninth streets, had long theretofore been established, and that in 1880 the grade was so changed as to throw his first floor below the surface of streets and sidewalks some two feet, whereas, before, it was about one foot above said level, to his damage $3,000.

The defendant below pleaded not guilty, and the statute of limitations of three years.

Verdict for $2,000 was rendered in favor of plaintiff, upon which the court gave judgment, and a new trial

being refused, the defendants below have appealed in error to this Court.

The Referees have recommended an affirmance of the judgment, and plaintiffs in error have filed exceptions to their report.

Our statute provides that "the corporate authorities of any incorporated town or city, when applied to by an owner of real estate within the corporate limits of the same, who desires to improve his lot, or build upon it, shall have the grade of the street or streets, upon which applicant proposes to build or make improvements established; that the applicant may construct his improvements so as to conform to the grade": Act of 1843, Code, sec. 1392.

Section 1393 provides that "said corporate authorities shall pay such applicant the full amount of any damages, he may sustain in consequence of the subsequent change of the grade of such street or streets by said authorities." And section 1394 provides that "said corporate authorities shall also pay to any citizen who has made permanent improvements on his property, situated on a street or streets the grade of which said authorities have neglected to establish, any material damage he may sustain in consequence of any grade which they may subsequently establish."

The first exception of the plaintiff in error to the report of Referees is, that it shows that the action in the first count is founded upon section 1392 of the Code, and there is no evidence to sustain the verdict under said section, that no grade is shown to have been *properly* established prior to the one complained

of, and established by the ordinance of 1880, that no application for a grade followed by neglect to establish it, is shown.

It will be convenient to consider the second exception with the first. It is, that the report shows that the second count of the declaration is founded upon section 1394 of Code, and no fact is shown giving cause of action under that section, as no neglect to establish a grade called for, is shown.

The argument for plaintiff in error is, that the record does not show any ordinance prior to 1879, establishing the grade of Chestnut and Ninth streets, nor is there sufficient legal evidence of any application for the establishment of any grade, nor of neglect to estabish after application. And that these facts can only be established by the production of an ordinance of the board, and that the engineer had no authority to establish grades. The case of *White* v. *Mayor, etc.*, 2 Swan, 364, is relied upon in support of this proposition. That case decides that the corporation of Nashville had no power to give any one or more members of the Board of Aldermen authority to require such citizens as they may designate, to construct foot pavements in front of their lots, and pass over others equally liable to such duty, nor could the corporation itself do it. It is added, the power conferred upon the corporation must be exercised by the persons upon whom by the act of incorporation, it is conferred, by themselves, or under their express directions, as in other cases of personal confidence and trust. But this case does not hold that the corporation may

not declare that a street shall be graded, and entrust the execution of that work to its engineer. It cannot be supposed that the Legislature, in giving the Mayor and Aldermen the powers enumerated in their charter, intended that they should be held to the personal performance of every duty imposed. From necessity a municipal, as well as other corporations, must discharge many of its functions and duties by officers and agents. It may, by ordinance or vote, clothe its officers or agents with power to act for it, and may bind itself by a contract thus made: 1 Dil. Mun. Corp., sec. 374. But its legislative power it cannot delegate.

The peculiar duty of the city engineer is to ascertain and establish the proper grade of streets, in the city. The Mayor and Aldermen elected him for the performance of this duty, and by an ordinance, passed in 1867, they declared it to be the duty of the city engineer "to establish the lines and grades of all the streets and alleys laid down in the original plat of the city," etc. And again, in 1871, they declare it to be his duty to "accurately survey all the streets within the corporate limits of said city; keep a record of said survey, ascertain the correct grades for each and every street, and report the same to the Board of Mayor and Aldermen of the city," and "deliver all such maps, profiles, surveys, and other papers made by such engineer" to his successor in office.

For the services imposed, certain fees were prescribed, to be paid by the person for whom, or at whose request the service might be rendered.

Again, in 1873, it was ordained that the city engineer shall establish a permanent grade of all the streets, alleys and sidewalks, and shall prepare a map, showing the grade of said streets, alleys and sidewalks, "which shall be kept for reference in the office of said engineer."

No ordinance, previous to this time (1873) is exhibited, showing that the Mayor and Aldermen had attempted by their own corporate action to designate or establish the grades of streets and alleys; but all of them seem to have committed that duty to the engineer, and directed that the maps, profiles, etc., that he might make under said several ordinances, should be kept in his office for the public use, and fees are prescribed to which the engineer should be entitled for his services, to be paid by the citizens for whom he might make surveys, plats, etc. Robt. Hooke was city engineer from December, 1872, to December, 1875, was born in Chattanooga, and was familiar with its streets and buildings, and testifies that the grade of Chestnut and Ninth streets was established prior to 1874. A grade stone was there erected and marked, and a profile in his office of the grade turned over to his successor. Hooke gave Geiler, on his application, the grades, and a certificate of them, and was paid his fee, and his house was built in conformity thereto. Deitz succeeded Hooke in 1875, and continued in office four years, and says the profile was found in his office, and is the grade which was established, and Geiler's building conformed to it.

The testimony of Hooke and Deitz, as to the grade, was objected to, but admitted. It is by other witnesses shown that this was the recognized grade for years before Geiler built. The streets were worked and kept in order on this grade. And in 1879, this grade was adopted by ordinance, and until 1881, it so remained until a radical change of it was made. The evidence objected to was properly admitted. It was proof of an existing, recognized fact. The witnesses did not pretend to say that the grade was established by ordinance; but Deitz does exhibit the profile, which Hooke testified he left in the office, which shows the grade as then existing, and which was established by the survey of the engineer as directed by previous ordinances which are exhibited. And it appears that prior to 1871 grades had been established, for in that year, in an ordinance defining the duties of the engineer, he is instructed to have streets and sidewalks laid "according to the grade and slope heretofore ordered by the Board of Mayor and Aldermen."

Upon these facts we are satisfied that the grade existed in 1874, recognized by the Board of Mayor and Aldermen and its engineers and the public, although no ordinance has been given in evidence of the fact of its formal establishment.

In a case in 3 Baxt., 338, this court held that a liberal construction should be given to the statutes in favor of the right of the citizen to recover damages to his property by the city authorities; notwithstanding that case did not fall literally within the provisions of the statute.

We are of opinion that the exceptions first and second are not well taken. The third exception reaches to a supposed error in the charge of the court that the grade of a street might be established by the engineer.

The argument is that the grade can only be established by ordinance. But the act of 1843 directs that the corporation "shall have the grade established." To this end we think it may order their engineer to do it. This has been done, and in addition, as before stated, they say in 1871, that the grades had been fixed theretofore, and this exception is not well taken. The fourth exception is that the judge charged sections 1392 and 1394 provide different grounds of action and are independent of each other. There is no error in this, as they do so provide. The fifth exception as to admission of parol grades, has been disposed of, in effect, in the disposition of the first, second and third exceptions, and as the evidence of facts shown was admissible. The sixth exception is that the judge erred in telling the jury that they could mitigate the damages by reason of benefits common to all property owners by the improvements. There was no error in this. The charge was correct: 2 Dil. Corp., sec. 487. The seventh exception is that the Commission of Referees should have noted the fact that the judge assumed certain ordinances read as proved, etc.

There was no error in stating that the ordinances were read, and that no formal ordinance was necessary to establish a grade under certain circumstances.

The eighth exception is that the defendant in error might have obviated the difficulty complained of in part, by reasonable diligence. This does not appear. The injury inflicted was serious, and could not be remedied except at very heavy expense. The ninth exception is as to the location of a grade stone, about which there is sufficient evidence to support the theory of defendant in error. The tenth exception was taken to the action of the court in permitting the recalling of the witness, White, and his further examinationn, and the refusal to allow plaintiff in error to call G. H. Jarnagin "to explain certain matters" brought out by White. Geiler had not finished the examination of his witnesses, and it was within the discretion of the court, to allow the witness to be called. It would have been irregular to allow defendant below to introduce contradictory or explanatory evidence of the testimony of one of plaintiff's witnesses at the time. It also appears defendant examined said Jarnagin and he had, or might have had, the benefit of any competent, contradictory or explanatory testimony of this witness. The eleventh and last exception is that the damages are excessive. We do not think so. The evidence fully warrants the amount found.

Upon the whole we think there is no error in the record, and the report of the Referees will be confirmed, and the judgment of the circuit court affirmed, with costs.

JOHN C. THOMAS *v.* JAMES C. HAMMER *et al.*

REVENUE COLLECTORS. *Lien for taxes paid.* A collector of revenue who has paid the taxes assessed on real estate sold under proceedings not recognized as regular, is entitled to be substituted to the lien of the State and county for the taxes thus paid, and a bill in chancery is the proper proceeding to enforce this right.

FROM SULLIVAN.

Appeal from the Chancery Court at Bristol. H. C. SMITH, Ch.

BAILEY & MCCROSKEY for complainant.

N. M. TAYLOR for defendants.

COOKE, J., delivered the opinion of the court.

One Samuel Stone was tax collector for Sullivan county for the years 1871, 1872 and 1873, and returned the lot in question to the circuit court, and had an order of condemnation and sale of said lot for the State and county taxes for these years, and proceeded to sell the same for said taxes, and bid in the lot for the State and county. But for some reason or alleged irregularity in said proceeding, the comptroller refused to recognize said sale as valid, or to allow him credit for the amount of taxes so bid upon the lot, and he was required to pay or account for same, which he did, and thereupon filed a bill against the owners of said lot alleging these facts, and seeking to be

substituted to the lien which the State and county had for said taxes. He obtained a decree of substitution to said lien, and sale of said lot for the satisfaction of the same, upon a credit of six months in bar of the equity of redemption. And at said sale, respondent, George T. Hammer, became the purchaser. The sale was confirmed, and the master directed to execute a deed to him for the same, which he did, dated July 24, 1880.

On November 10, 1874, an execution, issued by a justice of the peace, was levied upon said lot, which was subsequently returned to the circuit court, and an order of condemnation and sale was had on March 26, 1877, under which the same was sold by the sheriff, and purchased by complainant, to whom the sheriff executed a deed dated May 20, 1880. This bill was filed June, 1881, seeking to set aside as invalid said decree under which said lot was sold and the clerk and master's deed made and executed in pursuance thereof, for the reason, as alleged, that the same were irregular, and communicated no title, etc. The only irregularity attempted to be pointed out in these proceedings is that the specific directions of the statute for the sale of land by revenue collectors was not pursued by the decree or the clerk and master under it. The chancellor held that the respondent acquired the title to the lot by his purchase under the decree, and that complainant was not entitled to any relief, and dismissed the bill. The Referees have reported that the chancellor's decree should be affirmed. We see no error or irregularity in the proceeding of

the chancery court under which the respondent purchased the lot. The lein for the taxes existed from the time they were assessed upon it, which was prior to the levy of the execution and proceedings under which the complainant purchased. Said Stone was entitled to be substituted to the lien of the State and county for taxes; and a bill in chancery was the proper proceeding under which to obtain said substitution and sale of the land to enforce said lien: *State* v. *Duncan*, 3 Lea, 679; *Edgefield* v. *Brien*, 3 Tenn. Ch., 672; *Memphis* v. *Looney*, 9 Baxt., 131.

The exceptions to the report of the Referees will be disallowed, and the decree of the chancellor affirmed with costs.

J. W. FAUVER *v.* REBECCA FLEENOR *et al.*

1. HOMESTEAD. The homestead right is not a fee simple right, but a right of occupancy for life.

2. SAME. *Right of in equitable estates.* The right of homestead exists in equitable estates, but all liens acquired before the homestead has been established must be raised by the claimant of the right of homestead, or it will be sold to satisfy such liens.

FROM SULLIVAN.

Appeal from the Chancery Court at Blountsville. H. C. SMITH, Ch.

W. D. HAYNES for complainant.

C. J. ST. JOHN and THOS. CURTIN for defendants.

DEADERICK, C. J., delivered the opinion of the court.

The petition for rehearing by defendant, Rebecca, has been examined. It insists that the complainant bought the land of defendant, Jas. A. Fleenor, the husband of said Rebecca, and took assignment of his title bond, and because this purchase was ineffectual to convey the right of homestead, it was a fraud, and complainant took no interest in the land.

It is true that the assignment of the title bond, as declared in the former opinion, did not deprive the wife of the right of homestead, yet it did authorize the vendor of Fleenor to convey to complainant his interest in the land, subject to the homestead right. And this right it was declared that said Jas. Fleenor could not convey without the consent of his wife. It follows that the wife may claim the homestead right in the land to the extent of the interest therein of her husband—that is, homestead subject to the lien for purchase money. He had paid a portion of the purchase money, and authorized this original vendor to convey it, the fee, to Fauver, upon payment of the balance of purchase money. This balance, of about $274, and interest, was a lien in the vendor's hands upon the land, and we held that on payment by complainant of said balance to Hawkins, the vendor, and upon the execution of a deed, as directed by Fleenor, by Hawkins to complainant, Fauver, the

latter held the same lien upon the land which Hawkins had held.

The decree directs that the land be sold to pay this purchase money, and the excess, if any, be invested in a homestead for said Rebecca and children. This is precisely the right which Hawkins could have enforced, and to which complainant was subrogated by the deed from Hawkins to him.

The decree further provides in the alternative that Mrs. Fleenor, by paying the balance of the purchase money, and thus removing the incumbrance upon the land, may keep the whole place as a homestead. It is insisted that if she pays the balance of the purchase money she should be entitled to the fee simple in the land.

We do not think so. The homestead right is not a fee simple right, to the land, thus set apart, but a right of occupancy for life of the tenant and his or her children during minority, and this is Mrs. Fleenor's right. So that the reversion or remainder interest after the termination of the homestead right remains in the owner of the fee simple, or the party who has a right to call for the fee simple, and Fleenor may make a sale of this without the consent of the wife, or it may be sold by his creditors. All that Mrs. Fleenor is entitled to is a right of homestead in so much of the land as Fleenor paid for; but she cannot have this until the vendor's lien is paid and removed. This lien, upon the whole, may be satisfied in either of two ways, first, by paying the amount of the lien; second, by allowing the land

to be sold for its satisfaction. And however it may be satisfied, the holder of the fee simple title would be entitled to the land, after the termination of the homestead right.

Thompson on Homesteads, while admitting the right in equitable estates, declares it subject to vendor's lien: Secs. 170, 171, 172, 173 and 330. And in section 331 it is said that "all liens acquired before the homestead has been established must be raised by the claimant of the right of homestead, or it will be sold to satisfy such liens;" and this is the decision as declared in the decree; that is, that complainant may enforce the payment of the balance of purchase money due by sale of the land, or that the party who claims the homestead must pay the encumbrance; and this removal of the lien by the claimant must be done to effectuate the enjoyment of the homestead, and does not disturb the fee. That remains in the vendor or his assignee. But if the land be sold to satisfy the purchase money, the purchaser would take the fee for the satisfaction of purchase money, the residue, if any, would be invested in a homestead.

If complainant is entitled, subject to the wife's right of homestead, to the land paid for by Fleenor, and assigned to him by virtue of the assignment of the title bond and deed executed by Hawkins, to the fee in the entire tract, the payment of the balance of unpaid purchase money by Mrs. Fleenor, if she elect to do so, would not divest him of his title, but would simply remove the encumbrance and entitle her to the whole as homestead.

All that she is entitled to, is homestead, in any aspect of the case. She is not bound to pay the money to remove the encumbrance of the lien, but may do so at her option. If she does not, the land must be sold for that purpose.

The decree is correct, and the petition for rehearing will be dismissed.

BESSIE M. JOHNSON, Aministratrix, *v.* ANDREW J. PATTERSON, Administrator, *et al.*

1. ADMINISTRATION. A personal representative has no power to convert personalty into realty, and if he does so, it will be considered in equity as personalty and distributed accordingly.

2. REAL ESTATE. The most controlling test as to whether property connected with real estate is to be deemed realty or a mere chattel, removable at pleasure of owner, is the intention and purpose of the creation.

3. ADVANCEMENT. An advancement is a gift by a parent *in presenti* of a portion of the share of his child in his estate which would fall to each child at the parent's death, by the statute of distribution or descent.

4. SAME. The intention to make a gift and not an advancement, must be shown by clear and unmistakable proof, to be arrived at from a survey of the conduct and conversation of the donor at or about the time of the gift.

5. SAME. *Interest on.* Interest should be charged on advancements from the time of the death of the ancestor.

6. CHANCERY PRACTICE. *Objection to evidence.* Exception to the relevancy or admissibility of matter testified to by a witness, m y

made by exceptions to a report of the clerk and master based on such evidence, but a general exception to the competency of the particular witness does not reach the matters of his testimony, if the witness be in fact competent. Such objection goes to the individual and not to the matter. So an objection to an entire deposition when part of it is competent, and part not, will not be noticed by the Supreme Court.

7. EVIDENCE. *Attorney.* Under the Code, section 4754, does not include transactions between attorney and client, that have no element of confidence in them, of which he is competent to testify, *e. g.*, he may prove his client's hand-writing, what money was collected by him, when paid over and to whom paid.

FROM GREENE.

Appeal from the Chancery Court at Greeneville. H. C. SMITH, Ch.

J. T. & JNO. K. SHIELDS, A. B. WILSON and H. H. INGERSOLL for complainants.

ROBINSON & MALONEY and THOMAS CURTIN for defendants.

FREEMAN, J., delivered the opinion of the court.

This bill is filed to settle the estate of the late President, Andrew Johnson, who died July 31, 1875.

Soon after his death his widow administered on his estate. She, however, died in six or eight months, and then his only surviving son, Andrew Johnson, Jr., was appointed administrator *de bonis non.* After this, in March, 1879, Andrew Johnson, Jr., died, it being about three years after his appointment. He left complainant his widow and only distributee, and his two sisters, defendants, Mrs. Stover and Mrs. Patterson, as

his heirs. His widow, the complainant, has been appointed administratrix of her husband, and Andrew J. Patterson, administrator *de bonis non* of his grandfather, Andrew Johnson, Sr.

On October 8, 1879, complainant filed this bill as administratrix of her husband, and in her own right for a settlement of the estate of Andrew Johnson, Sr., a general account of the same, and in addition, an assignment of dower in the lands in which her late husband died seized.

This case was before us two years since, when it was fully and ably argued, but the main questions were not then decided, the appeal being premature before a final decree. It comes now after a final decree, with a report of the Referees, to which exceptions are filed by both parties. We will first dispose of the matters raised by the exceptions on the two leading questions of law debated before us, to-wit, whether the "brick cotton factory" property is to be treated as personalty or realty in the distribution of the estate, and whether the Henderson farm given to Mrs. Patterson is to be treated as an advancement, and be accounted for as such or not? We need not state the terms of the exceptions, as the points raised will readily be seen from the statements of this opinion.

A short statement of facts in reference to each will serve to raise the points to be decided. When Andrew Johnson, Sr., died, he had a debt on one Prather, due by note for the sum of $10,000, bearing interest at the rate of ten per cent per annum for money loaned to start and carry on a cotton manufacturing

establishment. This debt was secured by a deed of trust to Thomas Maloney, conveying the brick cotton factory with the two acres of land on which it stood, with all the machinery and fixtures of all kinds in said cotton factory, consisting of six spinning frames and attachments necessary to operate the same, etc., with all appurtenances connected with or belonging to said cotton factory, with power to sell on default as is usual in such cases.

Some additions were probably made to the machinery by Prather after making the deed, but this is not deemed important on the questions presented.

During the administration of Andrew Johnson, Jr., default having been made in paying the debt secured or interest provided for, he required the trustee to proceed with the execution of his trust, and sell the property conveyed to him in order to realize the debt secured. This, no doubt, was concurred in by all the parties. Maloney advertised and sold the property in accord with the provisions of the trust deed, and the same was bought by the three heirs—Andrew, Jr., Mrs. Patterson and Mrs. Stover, for the sum of $10,500, leaving after deducting expenses of the sale something over $500 of the debt then due, unpaid. Maloney conveyed the property so sold to these purchasers, by a deed referring to the deed of trust of Prather for a fuller description of the same—and they went into possession of the same, and remain in possession, except Andrew, who is dead, but he was in possession until his death.

On these facts substantially it is claimed in the

bill, and urged in argument that the purchase was made by these three persons as heirs of Andrew Johnson, not as an investment, but as a means of realizing the debt due the estate—not with the purpose of converting the debt into real estate—and it is therefore maintained the said real estate so purchased is to be treated as personalty for the purposes of distribution.

In addition it is said argumentatively in the bill, that much of the "property was and is strictly personal property, and does not come within the definition of real estate, the whole having been purchased as a security for said debt."

The principles may be assumed as correct that a personal representative has no power to convert personalty into realty; and if he does so, it will be considered in equity as personalty and distributed accordingly: *Roberts* v. *Jackson*, 3 Yer., 79, and cases cited. But we are unable to see how the facts of this case come within the principles cited. It was not a purchase by the administrator at all, but by himself and his two sisters, who were the heirs and distributees, to whom the debt would have gone in process of distribution, had it been collected in money, as it is, they have bought the property as tenants in common, and as such took the title and hold it. They owe the money, as on a joint purchase, and would have to account for it in distribution of the estate—but as they are each entitled to the amount they owe, the settlement can be made in this way without actual payment, as this case stands—there being a large

surplus for distribution. But had the money been needed for the payment of debts, or there had been other distributees not joining in the purchase—they would have been compelled to pay the entire price in the one case, and in the other sufficient *pro rata*, to make up the interest of the other legatee, as it is the matter can be settled by a charge and discharge in taking the account of distributive share of each of the parties.

As to the point suggested in the bill, that much of the property was strictly personalty, and not realty; alluding as we learn from argument of counsel to the machinery making up a part of the cotton factory conveyd, we need say but little. The complainant stands in the shoes of her deceased husband in asserting the position that the machinery making part of the cotton factory is personalty. It is beyond question, that he and the co-purchasers purchased the whole property as one property, and treated it as such. The intent was to either use it permanently as such, and as a whole, or to sell it as a whole. Most certainly the parties did not intend to become owners as tenants in common of the brick house erected for the purpose of the enterprise, and to hold the machinery as personalty, with the right to divide it among them as such. It would probably, if not certainly have been impossible for them so to divide it, without rendering it useless for all practical purposes. Modern authorities all agree, that the most controlling test of the question, whether property connected with real estate is to be deemed realty or a mere chattel,

removable at pleasure of owner, is the intention and purpose of the erection: See *McDavid* v. *Wood*, 5 Heis., 98; *Saunders* v. *Stalling*, 5 Heis., 72; *Connor* v. *Hare*, 1 Tenn. Ch., 25; Wait's Act. & Def., vol. 2, 369, and cases cited. But the intent and the nature of the property taken as a whole, as the parties purchased it, and treated it, concur in making it a part of the freehold, and stamping it as realty, and it must so be held.

The next question to be determined is, whether a certain tract of land, known as the Henderson farm, containing about five hundred acres, valued in assessing for taxation, as since improved, at upwards of $11,000, and for which the intestate paid in 1867, $17,000, is to be treated as an advancement, and charged as such.

This land was conveyed by Andrew Johnson, Sr., in the adjustment of his estate, to his eldest daughter, Mrs. Patterson, February 18, 1873, she having been placed in possession of it in March, 1869.

The conveyance on its face simply shows that it was made "for the love and affection I entertain for my daughter, Martha J. Patterson, I do hereby give, transfer and convey to her, her heirs and assigns," etc. No further purpose is expressed, and the question is to be decided on the rules of law established in such cases, and the legal evidence to guide us as to the intention of the donor when he made the gift.

An advancement is defined by the authorities to be, "an irrevocable gift, by a parent, who dies afterwards intestate, of the whole or a part of what it

is supposed the child will be entitled to on the death of the parent making the advancement": See *Yancey* v. *Yancey*, 5 Heis., 357; Meigs' Dig. by Milliken, vol. 1, p. 74, sec. 11, and Wait's Act. & Def., vol. 1, 205, sec. 1, and cases cited. A shorter definition is, a gift by a parent *in presenti*, of a portion or all of the share of his child in his estate which would fall to such child at the parent's death by the statute of distribution or descent.

It is seen from this definition that the fact that there is a gift and conveyance of the title does not exclude the idea of an advancement, but that a gift and the title conveyed is an essential feature of it. In order to exclude the idea of an advancement, there must be shown not only a gift, but something additional—a gift, with a purpose that the property so given shall go to that child as something *over* and *above* the share of the other children of the donor. The purpose must be made out by satisfactory and affirmative testimony, such as the nature of the case will naturally demand, and if the fact be so, will naturally supply.

In view of our statute law on this subject, as well as on sound principles, it is settled that when a gift is shown by parent to a child the presumption of law is that it is intended as an advancement—it is a *prima facie* case (*Morris* v. *Morris*, 9 Heis., 817), which means, that a case of advancement is fully made out, justifying or demanding a decree by a court to that effect until the contrary case is made out by a fair preponderance, that is, the proof shall show sat-

isfactorily a contrary purpose. If the case should stand in equipoise on the proof, then the party seeking to assert the over portion having the affirmative must fail.

This is evident from the requirements of the Code as well as the principle underlying all our decisions on this question, as will be seen by the cases: Meigs' Digest, by Milliken, vol. 1, p. 74, sec. 4. The language of the Code, section 2431, would seem to demand that even a strong case, very clear and weighty evidence, should be given in order to overturn the presumption of our law, and the evident policy and purpose underlying it. It is that "absolute equality shall be observed in the division of the estates of deceased persons, except where a will has been made and its provisions render equality impossible." The next section requires "all advancements, whether by settlement or otherwise, in the lifetime of the deceased, or by testamentary provision, shall be collated and brought into contribution in the partition and distribution of the real and personal estate of the deceased; those in real estate first in partition of the real estate, and those in personal estate in the distribution of the personal estate." Section 2433 provides for this equality, by requiring collation of an advancement in real estate with the personal estate, where the advancement in real estate exceeds the child's share, and *e converso* where the amount in personalty shall be found to exceed such share. And by next section it is even provided that "where a power or trust is granted the parent to bestow property conveyed or

settled by the instrument creating the power or trust, in favor of one or more children of such parent, any property given under such power or trust to a child shall be collated and brought into contribution by such child claiming a share in the distribution of the property of the parent."

It might well be held on a literal construction of the first section, that the equality provided for could not be defeated at all, except where a will had been made rendering equality impossible, and in view of the other sections, that all property received by a child in advance of a parent's death, must be brought into the account and charged as an advancement against the child receiving it. Certain it is, these provisions require a clear and unmistakable case of a contrary purpose on the part of the donor to exclude the operation of this well defined policy of our law, that there shall be absolute equality observed in the division of the estates of deceased persons.

The testimony presented in this record on the point involved, that the gift of this land was intended to be over and above the share of the other children of Andrew Johnson, and not be accounted for in the settlement of his estate in the event that has happened, his death intestate, is very meagre. In fact there is none coming from the donor, in connection with the act itself that has any bearing at all tending to aid in the solution of the question.

The facts attending the gift are, that Mrs. Patterson was at his home in Greeneville, and just before she left for the depot to return to her home, her

father gave her the deed in an envelope and told her not to open the package until she got home. Mr. Jones, who had written the deed, and who seems to have been present at its delivery, says he made a "neat and touching speech to Mrs. Patterson when he handed her the deed." But this witness, though directly interrogated as to the language used, is unable to give it. We think it satisfactorily appears, even from the statements of this witness, that nothing was said on the question now under discussion, for he is asked what impression the language and conduct of Mr. Johnson made on him, both when the deed was written, and when delivered, as to the Henderson farm; says that from the conversation had with Mr. Johnson when the deed was written, and what he said when it was delivered, he was impressed with the idea that he intended to make her a present of the farm. It is evident that if any thing had been said more than this, this witness would have recalled it, as the basis of his view of the case, and he would not have forgotten so important a matter as that she should not be charged with the farm, or that it was intended to be given over and above what he should give his other children. Mrs. Patterson, however, makes this clear beyond dispute. She says nothing of any remarks made at the time of delivery, except the injunction not to open the package until she got home. It is certain if there had been a word as to intention on this subject she would not have forgotten it, and giving her testimony under the heat gendered by this contest, her memory, as the

party contesting the question, would have been refreshed as to all that bore favorable upon her side of the contested question. Persons engaged in such a contest are not liable to forget that which favors their own interest. But she has put this beyond all question by swearing positively that her father never mentioned the matter as to whether she was to be charged with this farm or not, either then or at any other time. So we may say it is certain, that neither at the time of the delivery of the deed, or at any subsequent time, was any thing ever said by Mr. Johnson as to his intention on this subject.

We add that Mrs. Patterson does say that she always considered it a gift, and she was not to be charged for it, but no further word in support of this view is shown to have ever been heard by her from the donor supporting this understanding. It can only amount to an opinion by the party in interest.

The testimony of Mrs. Stover, the other sister, so far from affecting this view, strengthens it. She is asked if she knew why her father gave Mrs. Patterson the farm. She answers: "She was the oldest child, naturally energetic, five years older than myself. We all depended on her more or less, and was my father's main support, as my mother was an invalid for many years. She was of great service to him in many respects, privately and publicly. These are some of the reasons why he made the deed of gift of said property." It is evident these are the reasons for the opinion of the witness—but it is certain that if her father had ever given these reasons to her, in

connection with a statement of an intention to give the farm over and above the shares of the other children, she would have promptly stated, as conclusive on the subject, that her father had told her so. The failure to so state makes it certain, that to neither herself or Mrs. Patterson had such a remark or intimation ever been made. There is some other testimony of like kind in the record which we need not notice.

The only testimony that tends to support with any certainty the contention of respondent is that of Mr. Fowler. He shows he was an intimate friend of Mr. Johnson's, and details the services rendered by Mrs. Patterson, as mistress of the Presidential mansion, at Washington, during the administration of her father, and also the keeper of his house during the war at Nashville, and then says he was at Greeneville, at Mr. Johnson's house in 1871. One day while there in his parlor Mr. Johnson spoke of his children, that his sons had been failures, but spoke tenderly of his two daughters—Mrs. Patterson and Mrs. Stover, said he was greatly indebted to Mrs. Patterson for her services at Washington. She had shown great self-denial, and her care and economy had saved him much money and that he then added: "In the course of my business I have become the owner of the farm on which she now resides, and I intend it for her as some compensation for her services rendered during my administration."

This statement of what the witness says is "the substance of his language, and some of his expressions in his exact words," is what the case of respondent must

turn on, so far as anything from the donor is concerned, as showing any purpose in making the gift.

We may remark, that it is what purports to be a statement of what the party had said nearly two years before the gift was made; the deposition taken November 24, 1881, upwards of nine years after the conversation occurred. In the nature of the thing such testimony has in it elements of inherent weakness—as we all know how difficult it is to repeat language accurately, in a casual conversation, after such lapse of time. We find it almost, if not impossible, to separate our present impressions from what memory actually gives us. In view of this, it is a rule of evidence in our law, that such testimony is the weakest of all testimony deemed competent.

In addition to this, the witness has not told us which is the language of Mr. Johnson in this statement, and which his own. But considering that substantially such a conversation was had, is it sufficient in view of all the other facts shown, to overturn the strong *prima facie* case of complainant made out by presumption of law, when the gift alone is shown, that it was but an advancement?

Under the rule stated by Judge Turney, 9 Heis., 818, for which *Morris* v. *Burroughs*, 3 Atkins, 403, is cited, that "the intention of the donor is to be arrived at from a survey of his conduct and conversation at or about the time of the gift, and the agreement must depend on the circumstances at the time, and cannot be made better or worse by subsequent facts," it is doubtful whether such testimony as

we are now considering is competent at all. It certainly does not accord with the general rule of admissibility on this question, which is "that when the nature of a particular transaction is called in question, a contemporary declaration by the party who does the act is evidence to explain it": *Evans* v. *Jones*, 8 Yer., 463. But conceding it is not too remote, for the sake of the argument, it is still not inconsistent with the idea, that this valuable farm was intended to be given and its profits enjoyed in advance of such a gift to his children, and these advantages might well be a reward for services rendered by a dutiful daughter. This might well have been done, with no intention to express anything on the real question as to whether she should account for the actual value of the farm after his decease. But be this as it may, when we turn to the other facts in the case, any inference drawn from the statement referred to is met by circumstances of more weight, by which its force is negatived and overturned.

The deed of gift was made by the late President Johnson, a man of commanding talents and more than ordinary intelligence. We must assume he would well understand how to make plain his intention in such a gift, if he had any beyond the fact, that he gave the property to his favorite daughter as part of his estate, to be by her enjoyed *in presenti*, with its rents and profits. We can hardly conceive, if he had any purpose beyond this, certainly the purpose she should not be charged with it in the final settlement of his estate—and this the very object of

the gift as now maintained—that he should not have said so in the face of the deed, and recited the facts of which witnesses speak, as the consideration moving him thus to discriminate between his children. This would have been done beyond question, if in fact any thing had been said to Jones, the draftsman, on which to base his assumed inference, or the one assumed in argument, that such a gift was intimated by Mr. Johnson, or had his mind been in any way called to such a purpose. Instead of this we have the consideration recited, the real one no doubt, as the love and affection he bore to his daughter, Martha J., precisely the recital that would have been found in a similar deed of gift to either one of his other children, had he given them property and conveyed it at that or any other time.

The donor having himself given in the face of the deed the consideration in his mind at the time when it was made, it ought to require very clear proof, that other considerations than this were the real ones, and they left to be gathered by uncertain inferences from the circumstances of his relation with his daughter, or a casual conversation with a friend. But add to this, what is maintained by respondent, that he made a neat little speech when delivering the deed, and yet the respondent herself cannot call to mind that either then or at any other time he had ever mentioned this additional consideration, or rather only real consideration for the deed, if her contention be correct now, and we can but conclude, that no such purpose then existed, whatever may have been his general purpose

to reward the special devotion of this daughter in the ultimate disposition of his estate, which is shown to have been considerably over $100,000, a very large one for this country. He could have settled this question at once and forever by using only about the same number of words as he has used, expressing his real intention, that she should not be charged with this gift. Instead of this he has left it open, so far as his own acts are concerned, to the presumption the law makes in such case, which he is assumed to have known to be the result of what he did, as he is conclusively presumed to have known the law of the land. The fact stated by Mrs. Patterson, that he never intimated to her that he intended to charge her for the farm does not meet the point at all. The real question is, did he ever intimate or say, it was not to be done? The act he had done did charge her, unless a contrary purpose is clearly shown.

The only other matter we deem necessary to notice on this question is the fact, assumed to have been proven, that before 1869, a package, containing the deed of Sevier, clerk and master, conveying the land to Mr. Johnson, was seen in his trunk, with the following lines written on it: "This I give to my daughter, Martha, for her kindness and great respect for her father, and I do not wish her interfered with, Andrew Johnson." This inscription fails, however, to make out the case claimed. It was only a declaration of a purpose—or could amount to nothing more—as it could not have been operative as a conveyance. It cannot be made to mean that when

given it should not be accounted for. If a man of Mr. Johnson's intelligence had intended this purpose, it would have been perfectly easy to say so, and that in apt and proper words to express his meaning, and the fact he has not done so in the deed together with the other circumstances of the case we have referred to, is totally inconsistent with the existence of such a purpose in his own mind. To hold the contrary would be to assume for Mr. Johnson, either less sagacity and intelligence than his high position and well known ability demands, or that he did not act as any other man of even less intelligence would have acted in giving expression to his purposes. Neither assumption is warranted by anything found in this record, therefore, cannot be assented to as true. The result is this farm must be accounted for at its reasonable value at the time when received.

We now proceed to dispose of the questions presented in argument on the account taken in the case. The broadest question presented, however, is as to the competency of certain witnesses, especially Maloney, whose testimony was, in general terms, excluded by the chancellor on or after the hearing on the first trial, and also on the hearing of exceptions to the last report.

The facts necessary to present the questions made in this case are as follows: Maloney's first deposition was taken and filed May 6, 1881. The case came on to be heard upon "bill, answers and proof," when the bill was dismissed as to Maloney, who had been appointed administrator *de bonis non*, after the death of Andrew Johnson, Jr., who had succeeded his mother.

The decree made by the chancellor on this hearing settled several questions, for instance, held that the Henderson farm was not an advancement, that the purchase of the Holston factory was an investment by Andrew Johnson, Jr., Mrs. Stover and Mrs. Patterson, with all the machinery and fixtures attached. It found that part of the real estate had been divided by agreement between the parties, and conveyances executed, but the value not fixed except a certain farm referred to. It then ordered an account on the basis of the facts found directing the value of the real estate to be ascertained at date of conveyances. A general account of the estate against the administrators who had been in charge of it was then ordered on the pleadings and proof in the record, and such additional proof as parties might offer.

This account embraced the usual elements of account in such cases, assets received, or that ought to have been received; debts due the estate at death of President Johnson; what remained due at qualification of present administrator; what disbursements he had made, etc.; what assets came, or ought to have come, to the hands of Andrew Johnson, Jr.; what disbursements he had made and if any were lost by neglect.

An account of amounts received by each distributee was ordered, Mrs. Patterson not to be charged with the Henderson farm. In addition an alternative account was ordered, in which the Henderson farm was to be treated as an advancement, and the Holston factory as personalty purchased to secure a debt, and

standing in the place of the debt, and then it is added the master may report on all special matters he may be requested in writing to report on by either party. Dower was also ordered to be assigned to complainant.

The master made his report to the November term, 1881, when various exceptions were filed, and the case heard on these exceptions by both parties. Nine of the exceptions by complainant were sustained, and the case again referred to the master for "a further and more detailed and complete account of the matters involved." It is then said: "The master will do so as indicated in the exceptions, and as hereinafter directed." It is seen up to this point, the decree adjudges nothing, as the result of his action, and leaves the whole matter open.

It then proceeds, however, on fourth exception, in sustaining it to make an adjudication on the *competency* of Thos. Maloney, defendants' witness, as the decree says: "In certain particulars as fully herein adjudicated," and then recommits said report to the master, as to all the items mentioned in the exception. It is then stated, that the defendants had moved to strike out exception to Maloney's testimony, made by complainant entered on the deposition, which was done because they were to the competency of the testimony, and should be taken at the hearing. Then follows a recital showing what the objections to Maloney's testimony were, that he was attorney at law and confidential legal adviser of Andrew Johnson, Jr., as an individual and as administrator, and he is incompetent to testify as to matters which came

to his knowledge through said relations, and it was so adjudged.) The court being further of opinion that the exception taken to the deposition of Thos. Maloney, as well as orally, on the hearing to the reading of the same as on the deposition, and exhibits thereto "in all such particulars of said depositions which relate to transactions and conversations had with and statements made by Andrew Johnson, Jr., and Andrew Johnson, Sr., and all information which the said Maloney received through his said relation as attorney and legal adviser, and would not have been known but, for said relation, and to such matters as was intended, or entrusted to him, which tend to injure and charge or in any manner decrease the estate of said Andrew Johnson, Jr., is well taken, sustains the objection, and adjudges the said witness as to the matters stated to the extent above stated incompetent, and the same be excluded, and the master in restating the account will not consider them to that extent." It was then decreed that the master's report be confirmed except as modified "and that portion of the same which is based on the incompetent testimony of Maloney, and also M. J. Patterson and Mrs. Stover," as to whom certain exceptions had been taken, after recommitting the report as to the matters referred to, the other part was in *all things confirmed.*

He then gives some eight specific directions as to taking the account, with a general one as to all matters proper for a final settlement.

Exception fourth, on which the ruling was made above cited, is because the master had based his

result, "so far as he had gone, and as far as the same is adverse to the interest of the complainant in the *main*, on the testimony of Maloney, and this is objected to, because the information was obtained while acting as attorney, and in consequence of that relation."

It is seen from this statement that the deposition of Maloney was read on the hearing at first trial, without objection, but had no bearing in the matter now referred to, on any question then adjudged.

On the matters of account then ordered, so far as his testimony was concerned, its bearing was alone to be operative in the future. We think the party to be affected by it, might well take the exception at the time he has done so, that is to say, by exception to the report of the master to such matter as was alone to be adjudged on the report, and a proper exception would raise the question of the relevancy or admissibility of the matter testified to by a witness; that is, whether the testimony was proper legal proof on which to base a liability on the party then making the objection. If the report was not based on legal and competent proof, it is a proper matter of exception, as this goes directly to the legal correctness of the result reached.

It is seen from this statement, that the exception itself points out no specific matter in the testimony of Maloney as incompetent. The deposition thus excepted to in the exhibits extends from page 274 to 381 inclusive, about 107 pages. It assumes that the main matter of the testimony of the witness is incompetent for the reason given. The decree of the

court only assumes in general terms that such testimony was incompetent in matters tending to charge complainant, "whose knowledge of the facts came through such relations," and to this extent, directed the master to exclude the testimony in restating the account.

The exception then is general to the main testimony of the witness, and the ruling is that so much of the facts as obtained by reason of the relation of attorney should be excluded, but the clerk left to decide what was, and what was not included within the rule. It is settled by all our decisions that a general exception to the competency of the particular witness, does not reach the matter of his testimony, if the witness be in fact competent. Such objection only goes to the individual and not to the matter to which he may depose: *Miller* v. *State*, 12 Lea, 225, where the cases in our court are collected by Judge Cooper; so an objection to an entire deposition where part of it is competent, and part not, will not be noticed by this court. The particular matter deemed objectionable must be specified in some particular way, as by the number of the questions and the answers, as the matter stated, and set out in full, so that we can see with reasonable certainty at least, what the objectionable matter is. This ought to be done in a bill of exceptions as being more convenient—but may be done in the decree—still it must have the indicated certainty: See *Brandon* v. *Mullinix*, 11 Heis.; *Taylor* v. *Mayhad*, 2 Head, 598; 2 Head, 121. The reason and necessity of the rule is

seen in this case. His Honor, the chancellor, for want of such specification, has merely ruled on abstract questions of law, and left the whole matter open on coming in of the report of the master to see whether he properly applied the rule. We are left in the same condition, to examine 107 pages of a deposition, to see what part of it was the result of professional confidence and what was not, and that upon a general objection which simply assumes that all which was thus known is incompetent. We cannot notice this objection for the reasons given.

The objection is one that can readily be made definite, and it should, in this case, have been done, as there is much if not all of the matter that is not within the settled rules of the law on this subject. Our Code, section 4784, (new Code,) has embodied but the common law principle in this language: "No attorney or counsel shall be permitted, in giving testimony against a client, or person who consulted him professionally, to disclose any communication made to him as attorney by such person, during the pendency of the suit, before or afterwards, to his injury."

This language excludes all communications, and all facts that come to the attorney in the confidence of the relationship. But there are many transactions between attorney and client, that have no element of confidence in them, of which he is competent to testify. For instance, he may prove his client's handwriting; may prove what money was collected by him, when paid over, and to whom paid: Weeks on Attorney, 277: Greenl. vol. 1, sec. 246.

For these reasons the report of the Referees holding the deposition of Maloney in this case should be excluded is disapproved, and the same must be considered as the basis of the account to be taken in the case.

The other exceptions to competency of witnesses need not be discussed, except when they go to the competency of the parties themselves to testify, and we believe there is nothing of any importance involved in this aspect of the case, as Mrs. Stover's testimony, Bessie Johnson's and Mrs. Patterson's were mainly on the question of advancement, and the character of the purchase of the Holston factory. Having settled these questions, it is unimportant to discuss the questions raised as to their personal competency. The result would not be changed either way by the testimony they gave which is as general in these cases as in the one discussed.

This ruling on the testimony of Maloney will necessitate the recasting of a considerable portion of the account. The amount thus involved will be seen from the Referees' report, and the exceptions thereto by the respondents.

We proceed now to dispose of the other minor questions raised by complainant and respondents in their exceptions to Referees' report. First, complainant objects to the valuation of the Henderson farm at $10,000. The proof varies from about $8,000 up to $17,000, the amount paid for it in 1876, by President Johnson. We have examined it, especially the depositions referred to in the exceptions, and think

the master or chancellor has reached about as near the correct result as can be done. It will stand at $10,000. The exception was disallowed, and Andrew, Jr's, estate charged with the Wilhoit debt of $882.61. Taking the proof referred to, we think the Referees' report is correct. Gass' deposition is not shown to have been excepted to on the hearing, and admitted the case is made out and the exception was properly disallowed. It is also objected, that interest was not allowed on the $3,500 compensation allowed Andrew Johnson, Jr., as administrator from date of his death. We think the Referees ruled correctly on this question. The amount of compensation in our practice is properly settled when the account is taken. It does not bear interest by law, and we see no reason why it should be allowed as a matter of discretion in this case.

An exception is taken because complainant's twenty-first exception to the master's report is disallowed, and Mrs. Stover exempted from charge of $782.35 rent of Lowry property. It is very clearly shown by the proof that complainant's intestate, as well as the other distributees, agreed upon a settlement of the divorce suit of Mrs. Stover, then Mrs. Brown, and that this item was then adjudged, together with others involved in a settlement of a debt due from Brown to the estate, and a balance struck as per agreement of parties, by which Mrs. Stover was released from this liability, and $1,040 agreed upon as the proper sum to be charged to her. She is properly charged with this sum. It was a settlement of a matter of interest to the family agreed on by all parties, and ought not now to be

disturbed by any one, much less by the administratrix and personal representative of Andrew, Jr., no fraud or undue means having been used in obtaining the agreement. This exception is disallowed.

The first exception of defendant to be noticed and not disposed of by what has already been said, is that Robinson's testimony was excluded by the chancellor and Referees. This was error, as he did not acquire the information by reason of any confidential relation, nor is the exception so taken or presented in the record, to be noticed.

The next is because the Referees have approved the holding of the chancellor that Mrs. Stover and Mrs. Patterson were not competent, as witnesses, to prove the facts they have deposed to, as to transactions with Andrew Johnson, Sr., on hearing at November term, 1881, and on final hearing in 1884. It is only necessary to say, that the objection is taken to their testimony in the precise form and language and in same decree, as the objection to Maloney's testimony, and for the same reason cannot be noticed so far as the hearing in 1881, is concerned. There is nothing in their testimony, however, bearing on the matters occurring between them and their father in reference to his property in which their testimony was not competent. His estate was not sought to be charged by any claim against him, to be made out by conversation or transactions had between them and him. It is only a contest between his heirs and distributees. Section 3813*d*, old Code, has no application to such a state of facts as this.

We need not discuss the question as made on hearing in 1881, as the objection is general in the decree without pointing out any matter of the testimony in any way objected to. The witnesses were competent as such, the point of the objection is to the matter of their testimony, and this objectionable matter is not designated. It is only stated that objection was made to the testimony of Mrs. Stover and Patterson, wherein they are of "statements by and transactions with Andrew, Jr." This points out and defines nothing, and cannot be noticed in this court. The next as to Maloney's testimony and his wife's is disposed of in the same way—it simply a personal objection to competency, and points out no objectionable matter deposed to. The sixth has already been disposed of as to the Holston factory.

Exception seventh is to a reported overcharge of interest from December 21, 1877. This exception is well taken, as the report shows that while Andrew, Jr., is charged with this sum as received in December, 1877, and did not in fact receive it until April after, yet he is credited with the same as paid out on same day and interest computed from that time; and so the result is the same in the end.

Eighth exception is to alleged errors in interest on two items. The exception, however, is too general to be noticed, even if well taken. It is that the record shows the report of the master is correct, and certain pages of the record cited—but in what the error consists we are not shown by the exception. This exception is overruled.

Ninth exception is to item $1,261, and was disallowed by Referees because supported by Maloney's deposition. This was error under what we have said in former part of this opinion; besides, the vouchers are presented for it, and these were not incompetent to be proven by Maloney in any aspect of the case. This exception to report of the Referees is sustained.

The tenth exception is admitted to be immaterial as it is only to the summing up of the report.

The eleventh exception is because the Referees report that the counsel fees of present administrator should not be allowed—they are to R. M. Barton $234.50, and J. H. Robinson $250, and paid for services in this cause. We see no good reason why they should not be allowed, a settlement of the estate was necessary to be had. The present administrator certainly was in no default. Had not been in office six months when this suit was commenced, and counsel was absolutely necessary to aid in its management. He was not bound to employ such counsel at his own expense, at any rate is entitled to be reimbursed for his proper expenditures under the facts in this case

The next exception is to the allowance of $3,500 for services of Andrew Johnson, Jr., as administrator. There is a good deal urged as to his want of capacity to manage the business, and that Mr. Maloney, his counsel, did most of the business. But after careful consideration, we do not see any reason to change this allowance. There seems to have been no mismanagement, and if the large amount, over $100,000, was well managed during the three years, or about that,

while he controlled it, by the aid of efficient counsel, we see no reason in this to cut down the compensation, which is certainly very reasonable.

The thirteenth exception is because Referees refuse to charge Andrew, Jr., with some checks, given in his favor by his father on a Knoxville bank. The checks are shown, signed by Andrew Johnson, by Andrew Johnson, Jr.,' and were paid to Andrew, Jr., by the bank. These checks are two of them for $100 each and two for $50. We cannot say, that these checks were or ought to be charged as advancement. We do not see any evidence that such was the case. The probability is, that they were sums given by the father to the son, but may have been for other purposes. It would have been a violent presumption to say, that small sums given by a wealthy father to a son were intended to be charged against the son.

Fourteenth, because Referees have refused to allow items of $50 and $700, because not made out of the proof. The $50 is shown to have been received by vouchers attached to Maloney's deposition, a receipt for registered letter was disallowed because thus proven. It should be charged to Andrew, Jr.

As to the $700 the exception is simply, that the Referees have reported that the exception of respondents to this item should be disallowed, because it is alleged that the proof to sustain them is insufficient. This is a proper charge, says the exception, and the Referees should have so reported. This is disallowed because supported by testimony of Maloney. It is within the principle we have announced of competency

of Maloney, even if the objection had been specifically made. It was proof of money paid over by the attorney, and he was competent in any aspect to prove this. It was in no sense a confidential communication. This item is a proper charge against Andrew, Jr., and the exception is well taken to Referees' report. The same principle applies to the items and the fifteenth exception, which are sustained by additional testimony showing money sent by registered letters or postoffice receipts and express receipts. This exception to report is sustained.

Sixteenth exception is that A. J. Patterson is charged with rents of Holston cotton factory. This exception must be sustained. The administration as such has nothing to do with real estate, unless needed to pay debts, and cannot be held officially responsible in a case like the present. Besides it shows he was in possession only as agent of owners, Mrs. Stover and Patterson, and not as administrator.

Seventeenth exception is because of allowance of interest against Patterson on amount of money shown to have been in his hands by clerk's report. We concur with Referees that this is a proper charge. From his own testimony we think he has used this money, as he does not pretend that he has kept it separate from his own funds, only that he has always had money on hands to settle. He could have relieved himself by paying it into court.

The eighteenth exception is for failure to report, that A. Johnson, Jr., should be charged with $10,000 in bonds, whereas he is charged $9,450. We think

the parties received the bonds at face value. The others did so, and so the matter was settled, and should stand at that sum. Exception allowed.

Nineteenth exception is as to value of hotel property fixed by master's report at $3,500, raised to $4,000 by chancellor. We think the master's report is sustained by the proof, and that sum will be charged.

The next and last question is, as to the charging interest on advancements. This is raised as to the Henderson farm mainly, if not entirely, in the argument.

It is settled by all authority, we believe, that interest is not to be charged before the death of the testator or intestate: See Wait's Act. & Def., vol. 1, 212, and authorities cited.

The chancellor charged no interest whatever in his decree. The Referees report that interest should be charged on advancements made in the lifetime of intestate from time of his death. It was so laid down as a *dictum* in the case of *Burton* v. *Dickinson*, 3 Yer., 112, and approved in editor's note, p. 122. It was so decided as the general rule in the case of *McNairy* v. *McNairy*, Nashville, December term, 1874, after much consideration in an able opinion by Judge McFarland.

We think this, as a general rule, is correct, as then held, and the Referees have correctly reported on this question. It will, in most cases, produce the desired end, as said in that opinion; there may be cases where it might not reach equality, the leading object of our law in such cases, and then it could be so applied as to produce that result. In this case

it will work no injustice, as far as we can see, and if the advancement is not charged with interest from the death of the ancestor, then the party will be getting that much more than an equal share of the estate. She will have to account for it, and have it charged against her, at its value when received, and starting from the death of Andrew Johnson, interest will be calculated on the ascertained value as fixed in this opinion.

The questions raised on certain pleas in abatement were waived and abandoned by counsel on the argument, and need not be considered. A decree can be drawn in accord with this opinion. Costs will be paid out of the funds of the estate.

CALEDONIA HUNTER *v.* G. W. GARDENHIRE, *et al.*

1. LOST WILL. *Proof to set up.* To set up a lost will of realty requires the clearest and most satisfactory evidence of two unexceptionable witnesses.

2. COLLUSIVE LITIGATION. Where complainant and certain defendants collude to defeat another defendant in litigation, and the other defendant is discharged for want of proof, neither of the colluding parties is entitled to demand a decree against the other because of admissions made in aid of their scheme. The court in its discretion decrees a dismissal of the bill, and taxes all the colluding parties jointly with costs.

FROM HAMILTON.

Appeal from the Chancery Court at Chattanooga W. M. BRADFORD, Ch.

CLIFT & BATES and J. A. MINNIS for complainant.

DEWITT & SHEPHERD and KEY, RICHMOND & CLARK for defendants.

INGERSOLL, Sp. J., delivered the opinion of the court.

This bill is by a young woman of twenty-three years to set up the will of her grandfather, William Gardenhire, alleged to have been suppressed or destroyed by her uncles, defendants, more than forty years ago, and to assert thereunder her title in remainder to an undivided interest in valuable real estate in and near the city of Chattanooga, owned and held by numerous defendants under deed of conveyance in fee from the heirs of her said grandfather, and to have said clouds removed from her title; or, if not entitled to this relief against the purchasers, then she prays for a judgment against her said uncles for the value of her share in said lands.

The present owners of the land demurred, and the chancellor allowed their demurrers. Two of the uncles, both insolvent, one of them a shrewd schemer called "Judge," who contracted for one-third of complainant's anticipated recovery in this case for the consideration of proof to be furnished by him, and the other called "Doc," an octogenarian, who, after a long, rambling life, had returned to Tennessee from Illinois, "bringing nothing with him and leaving nothing behind," and is living around with his kinfolks, and particularly with "Judge," join in an answer, prepared for them by complainant's solicitors without fee or even

the promise thereof from them, wherein they admit the due execution of the will by their father and the devise of all the testator's realty to complainant's mother for life, with remainder-over to her children, if she should be married and have any; and "Judge" confesses that he participated in the suppression and spoilation of the will, whereby his sister was defrauded of her land, and his father's mulatto children of their freedom.

The other brother, G. W. Gardenhire, the principal defendant, out of whom complainant and her champertor uncle expected to make their money, answered on oath denying generally and particularly all the material allegations of complainant's bill, on which her right to relief must rest.

A large volume of proof was taken on both sides. On the hearing the chancellor declared the equities of the bill met and denied by the answer of G. W. Gardenhire and not sustained by proof, and dismissed the bill entirely, not even allowing complainant decree against her uncles, "Judge" and "Doc," who expressly confessed all the facts, and law, too, on which she based her claim. She appealed.

The Referees recommend affirmance and complainant excepts.

The first objection to the decree and report is that the chancellor forced complainant to trial over an application for continuance based on affidavits. The Referees, on examination of the affidavits, pronounce them insufficient to require a continuance, and report that the refusal thereof by the chancellor does not call for reversal. We concur in the conclusion of the

Referees on this point, not, however, for the reason assigned of the insufficiency of the affidavits, but for the more satisfactory cause, that it does not appear from the record that they were ever presented to the chancellor, or that a continuance was ever asked by or refused to complainant.

The other exceptions may all be gathered and considered together under the sixth, and this treated as a sufficiently specific exception to the finding and report, "that the complainant has failed to make out her case, and that William Gardenhire left no will, as described in the bill," to open the entire case. This presents solely a question of fact; and the contention is to be decided by the weight of proof. For, though complainant's mother is still alive, and complainant therefore not entitled to recover possession of the land; yet, if she is the devisee in remainder, and third parties under conveyance from the life-tenant and from others, are claiming and holding the land, she may have these clouds removed; and if her muniment of title has been fraudulently suppressed and destroyed by others, who have thereupon claimed and sold the land as their own, by means of which suppression of title and sale of land she has lost title thereto, the spoliators must account to her for the value of that of which their fraud has deprived her.

Geo. W. Gardenhire not only answers on oath, denying all charges of fraud and spoliation by him, and even the execution of any valid will, particularly one giving any title to complainant, but he fortifies his answer by proof of his good character by credible

witnesses, Judge Key, deposing on an acquaintance of thirty years, that he is "as honest and honorable in his dealings and contracts as any one he ever knew, and that that was his character with those who had dealt most with him." Complainant, to obtain a decree, must show not only that her grandfather left a valid will, but also that she was a devisee in remainder thereunder; for, it is plain she can have nothing in virtue merely of the alleged devise to her mother in fee. To prove this, she must not only comply with the general rule of evidence in equity requiring the sworn answer to be overcome by two credible witnesses, or the equivalents thereof, but she must also raise her proof to the standard required by the well established rule applicable to cases of this character, wherein it is sought to set up a lost or suppressed will.

As stated by Swinburne, the rule is: "If a testament be made in writing, and afterwards lost by some casualty, if there be two unexceptionable witnesses, who did see and read the testament written, and do remember the contents thereof, these two witnesses deposing to the tenor of the will are sufficient; and Williams on Executors, p. 209, adds that the contents or substance of a lost will may be established upon satisfactory proof that it was duly made and not revoked by the testator; "but when allegations of this sort are made, they must be supported by the clearest and most stringent evidence." This rule of evidence has been approved and applied by this court in *Buchanan* v. *Matlock*, 8 Hum., 389, and other cases. Has complainant by the clearest and most stringent

evidence of two unexceptionable witnesses, who saw and read the will and remember the contents thereof, overcome the answer of defendant, Geo. W. Gardenhire, with proof that she was a devisee in remainder under a valid will of William Gardenhire?

If the question were only whether the old man had made a will, it might be open for argument; indeed it may be conceded for the purpose of the present case that he did make one, freeing his slaves, and giving the rest of his estate to his daughter, Susan. But the only witness who deposes that the children of Susan Gardenhire, mother of complainant, were to have remainder over after Susan, is Jas. T., *alias* "Judge" Gardenhire; and he is anything but unexceptionable as a witness.

Impeached by a score of credible witnesses, distrusted even by his friends where he has interest, confessing at last, after repeated denials, that he had been interested as a champertor in the suit, indulging in prevarications and evasions, and when detected and exposed, offering frivolous and incredible excuses for his quibbles and untruths, he appears in the record as a most exceptionable and untrustworthy witness, hardly able to sustain an allegation undenied, surely not credible enough to overcome a sworn answer even in the slightest, and most irrelevant matter, much less in matters of moment requiring the clearest and mos stringent proof.

Having failed in the proof against Geo. W. Gardenhire, complainant is therefore entitled to no decree against him. But since he has not appealed nor ex-

cepted to the report of Referees, recommending the affirmance of the chancellor's decree against him for one-half the costs, the same must be affirmed.

A former appeal by complainant from the decree of the chancellor, sustaining the demurrer of the purchasers, was dismissed for prematurity: 10 Lea, 87. No exception being taken here to that action, the decree of dismissal will stand as to the purchasers, without inquiring into the correctness of the holding on the demurrers.

As to defendants, Jas. T. and Matthew Gardenhire, the case presents an interesting question. They have admitted the due execution of a will making complainant a devisee in remainder; and one of them confesses his participation in the alleged combination whereby it was suppressed; both admit her right to the relief she seeks, which is, alternatively, a decree for the value of the estate in remainder, of which she alleges she was deprived by the suppression of the will. But as to defendant Geo. W., the proof fails to establish any right in her under a will.

Yet her right to a recovery must depend upon the establishment of the character of will alleged; and it would not seem consonant with justice for the court to say in one breath there is no will, and the next there is a will. Again, her alleged life estate has not yet fallen in; and the estimation of its value would prove a matter of so great difficulty, that the court ought not to undertake it unless justice demands it. Whether a complainant would be entitled to decree against defendants answering *bona fide* in

such case as this, or even *mala fide* as in this case, is not free from difficulty. Defendants certainly are estopped by their answer to complain of or resist a decree against them. Perhaps it would be a wholesome lesson to them, and to other defendants embarking in a palpably collusive suit to allow the penalty of a decree, confessed by them to be proper, to be enforced against them, though their confession is probably untrue and made with the hope of gain.

Whether such decree is allowable we do not decide. Complainant and defendants are both insolvents, and this interesting question of law may be of no moment to them. But, as we do not understand complainant as pressing her demand for a decree against her confederate uncles, and as justice does not require it, and none of the parties are before the court with clean hands and in an attitude to demand anything, we are of opinion that the bill should be dismissed also as to defendants, Jas. T. and Matthew Gardenhire, with judgment against all three jointly for all the costs save that adjudged against the other respondent. Decree accordingly.

SHIPLEY, ROANE & CO. *v.* R. E. GOODWIN.

STAYOR. An order for the stay of execution on two judgments against T. C. W. & Co., and P and T and W, does not authorize the justice to enter the stay upon a judgment against T. C. W. & Co., although at the time another suit was pending before him against T. C. W. & Co. and P and T and W, judgment on which was not rendered until after date of order to stay.

FROM JOHNSON.

Appeal in error from the Circuit Court of Johnson county. NEWTON HACKER, J.

C. J. ST. JOHN and C. R. VANCE for Shipley, Roane & Co.

JOHN P. SMITH and H. M. FOLSOM for Goodwin.

DEADERICK, C. J., delivered the opinion of the court.

Judgment was rendered by the judge of the circuit court of Johnson county in favor of defendant, a jury being waived and a new trial being refused, plaintiffs have appealed in error to this court. The Referees, in a majority report, have recommended a reversal of the judgment and defendant has excepted to the report.

Suit was brought on a promissory note by plaintiff against T. C. White & Co., said White and J. S. Laws constituting the firm, and judgment was rendered against them December 2, 1882, for $271.07. On December 4, 1882, T. C. White presented J. F. Grind-

staff, the justice of the peace of Johnson county who rendered the judgment, the following order:

"BUTLER, JOHNSON COUNTY, Dec. 4, 1882.

Mr. Grindstaff—Mark me as stayor on them (2) judgments that you rendered against T. C. White & Co., and J. F. Perkins and E. C. Taylor and Wester, last Saturday. R. E. GOODWIN."

Upon this order the justice entered the name of Goodwin as stayor of the judgment he had rendered on Saturday, December 2, 1882, against said T. C. White and J. S. Laws, partners under the firm name and style of T. C. White & Co.

At the time of the rendition of this judgment there was another suit pending before said magistrate, of D. C. Wester, for use of the Bank of Bristol against T. C. White & Co., and J. F. Perkins, E. C. Taylor and Wester, but "no judgment was rendered in that case until December 5, 1883," (perhaps 1882.) After the expiration of the time of stay of judgment, execution was issued on the first named judgment and was levied on the land of Goodwin, who filed his petition for writs of *certiorari* and *supersedeas*, and upon return of the writs, upon his motion, the execution was quashed.

The petitioner denies that he stayed or intended to stay any judgment in favor of plaintiffs against White & Co.; but that he did intend, by his order, to stay an execution in favor of the Bank of Bristol against White & Co., and Perkins, Taylor and Wester, as specified in the order.

In the case of *Gwinn* v. *Harrell*, 12 Lea, 738, Judge Cooper has reviewed most of our cases in which the sufficiency of the order to stay, has been

discussed, and holds that if the case is otherwise identified with reasonable certainty, and the description of it correct as far as it goes, the omission of the given names of the plaintiffs is immaterial. The case cited is one in which the suit is brought against two defendants and the judgment was rendered againt one only, and the order was to enter the stayor's name in the case of *Harrell* v. *Brannock*. This was held no misdescription as the *case* or *suit* was brought against the two. But it is added, "if the order had described the *judgment* to be stayed as being against both, it would have been insufficient." This would have been a misdescription of the judgment. Where the description is correct as far as it goes, and reasonably identifies the judgment, it may be aided by extrinsic evidence. But in this case the judgments as described, are against White & Co., and others named in the order, and the judgment defendant is made to stay, is against White & Co. only, and is not the judgment described in the order. There may have been very satisfactory reasons why defendant would be willing to stay a judgment against White & Co. and Perkins, Taylor and Wester, and unwilling to stay one or more against White & Co. only.

Report of Referees will be set aside and judgment below will be affirmed.

GEORGE T. PARKER *v.* EAST TENNESSEE, VIRGINIA & GEORGIA RAILROAD COMPANY *et al.*

RAILROAD. *Damages for land taken.* The statutory remedy provided by section 1347 of Code, is not exclusive, and the land-owner is not bound to exhaust that remedy before resorting to a court of equity.

FROM BRADLEY.

Appeal from the Chancery Court at Cleveland. W. M. BRADFORD, Ch.

LEWIS SHEPHERD for complainant.

COOKE & SON for defendants.

FREEMAN, J., delivered the opinion of the court.

This bill is filed to enjoin defendant, the railroad company, from occupying, holding, and controlling a right of way for a branch road being constructed over complainant's land by said company, "until compensation is made both for the land occupied, as well as incidental damages have been paid or secured, and until appropriate steps are taken to condemn and appropriate said land in a lawful manner."

The chancellor overruled a demurrer, presenting numerous grounds of objection to the bill, from which he allowed an appeal to this court by the defendant. The Referees recommend the affirmance of this decree on several grounds stated in their report filed in the cause.

The respondent files a single exception, which is as follows: "Because the Referees do not report that the statutory remedy provided by section 1347 of the Code is exclusive, and that complainant was bound to exhaust that remedy before resorting to a court of equity." This is the only question before us for decision on the facts stated.

While it was held in the two cases in 2 Head, 171, and 3 Head, 600, that the general rule was, that where the statute granting the charter, gave a complete remedy to the landholder; yet in the case of *Duck River Valley Railroad Company* v. *Cochrane*, 3 Lea, 178, this court held that since the Code—that is, since 1858—the provisions from section 1325, *et seq.*, relied on by respondent in the exception the charter remedy was not exclusive, but an action on the facts of the case would lie in a court of law, and such action was sustained.

This being so, we hold on the facts charged in this bill, especially on demurrer, the remedy sought in a court of equity is not only appropriate, but the only one complete and adequate to redress the injury.

It is charged the East Tennessee, Virginia & Georgia Railroad Company had no authority under their charter to build the road, and this company, by its agents and its officers, had taken possession of the land and had done the incidental damages complained of. It is then charged that this company has assigned all its property to the Trust Company of New York, a defendant, to secure $22,000,000 loaned the company, and so a judgment at law would be worth-

less—the company being insolvent. It would be a useless expense and idle expenditure of money to litigate with the company under the statutory remedy on this state of the case.

Our bill of rights is imperative, section 21, "that no man's particular services shall be demanded or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor, and this compensation must be secured beyond all contingency": 7 Heis., 538, 541. That is, it must be secured to be paid, or else it cannot be said that "just compensation" has been made therefor. In fact, a strict construction of the language would require actual payment in cash before the taking. It is certain, however, this language cannot be complied with either in letter or spirit, where the land is entered upon and taken, and not only no compensation paid or secured, but the party required to engage in a fruitless litigation with an insolvent company, the result of which would be a judgment only, but no compensation whatever. This would be to take the citizen's land and impose the burden and expense of a law-suit only by way of compensation, and make the constitutional provision an illusion.

While in the case of *White* v. *Nashville & Northwestern Railroad Company*, 7 Heis., 528, there had been an assessment of damages by proceedings instituted by the land owner, there is nothing in that case contravening the view we have taken of this. The case was not decided on that fact, but on the general

ground, that the company could not be permitted to take and hold complainant's land without compensation as required by the Constitution. The principle of that case sustains the conclusion herein indicated.

The report of the Referees is approved and chancellor's decree affirmed with costs. The case will be remanded for an answer.

13L 679
15L 537

JACOB WILLAFORD *v.* A. J. PICKLE, Commissioner

1. ROAD LAW. *Exemptions.* The act of 1881, section 4, does not repeal section 1620 of the Code authorizing the county court to exempt certain persons from working on public roads.

2. SAME. *Jurisdiction of county court.* The power of the county court to exempt certain persons from working on public roads is the exercise of the general police power of that court, and are not strictly judicial proceedings, therefore the strict rules with reference to statutory jurisdiction should not be applied.

FROM JEFFERSON.

Appeal in error from the Circuit Court of Jefferson county. JAMES G. ROSE, J.

J. S. ROGERS for Willaford.

G. W. PICKLE for Pickle.

FREEMAN, J., delivered the opinion of the court.

This suit was brought by Pickle, as commissioner of road district, in Jefferson county, to recover for

failure of defendant to work the public road after being duly notified, as the law requires, by the commissioner.

The defense is, that defendant had at July term of the county court, been released from this service, by an order as follows: Tuesday, July 3, 1883, ordered by the court that Jacob Willaford be released from working on roads in the future, on account of disability.

The main question in the case is, whether the county court had jurisdiction to release under our present law. His Honor, the circuit judge, held the county court had such jurisdiction, but that it was a special statutory jurisdiction, and all the facts must be shown on the face of the order to authorize its exercise, or else it was void, and so held the order no defense, and gave judgment against the defendant.

By section 1620 of Code, the same provision being found, section 4212, old Code, "the county court may exempt from working on public roads, and paying poll-tax, any person unable by manual labor or physical exertion to make a support, whenever it appears just and right."

We do not think the principle applied by his Honor should be applied to these informal proceedings of the county court, that is, that all the facts mus appear in the entry of the action of the court, that shall show that a proper case was made to appear to the court, on which its action was based, or else the judgment void. If this principle was thus applied, it is probable not one in a hundred of the orders

made by these courts would be valid. They are made in the exercise of the general police power of the county court, are not strictly judicial proceedings, in which litigated questions are adjudged, and therefore the strict rules with reference to statutory jurisdiction adopted by our courts in litigated cases, should not be applied. We think the order sufficient on a collateral attack, if the court had jurisdiction.

In 1881 the Legislature inaugurated a system for working and managing the public roads of the State, by which it was made the duty of the county court to divide the counties into road districts, and to elect three commissioners for each district, who should have "control of all highways and bridges in their respective districts": Acts, ch. 38, sec. 1.

By section 4, it is enacted, that all male inhabitants over eighteen and under fifty years of age, *except such* as are permanently disabled from performing common labor, *and are released by the commissioner*, shall work not less than three nor more than six days, etc.

By Code, section 1183, sub-sec. 7, it is the duty of the county court "to assign to the roads of the first and second class a competent number of hands to keep them in repair, observing at discretion a proper distinction between said roads. This, and succeeding sections, to 1193 inclusive, were assumed to have been repealed by the Act of 1881, and were re-enacted and revived by the Act of 1883, p. 173, so that the county court still has the duty imposed on it to assign to the roads specified, a competent number of hands.

The question is, whether the Act of 1881, section 4, by necessary implication repealed the Code, section 1620, authorizing the county courts to "exempt from working on public roads, any person unable by manual labor or physical exertion to make support, whenever it appears to be just and right."

While it is now the settled doctrine of this court that implied repeals are constitutional, still they are not favored, and where the conflict between a later statute and a former one is not clear, and a necessary implication, such repeal will not be held.

After careful consideration we do not think the act of 1881, section 4, repeals section 1620 of the Code. The jurisdiction of the county court may well remain, and both statutes have full effect.

The commissioner may well release or rather excuse hands that have been assigned him who are permanently disabled from performing common labor, and the county court, in the exercise of its police power, release citizens where it is just and proper, under section 1620. This being so, the judgment of the court is reversed and judgment rendered for defendant.

ROBT. HOTTELL and WIFE *v.* JOHN J. BROWDER *et. al.*

WILL. *Construction.* The will of the testator provided: "I will, bequeath and devise all the remainder of my estate, both real and personal, to my two daughters, Julia and Elizabeth, for their sole and separate use, share and share alike, free from the contracts, debts or liabilities of their respective husbands, and in case of the death of either of my said daughters above named, then my will is that all that part of my estate which hereby I give to her, shall go and descend to her children." *Held*, that an absolute estate is given to the daughters exclusive of the marital rights of the husband, with a conditional limitation over, in the nature of an executory devise to their children on the death of either of them.

FROM BRADLEY.

Appeal from the Chancery Court at Cleveland. W. M. BRADFORD, Ch.

J. N. AIKEN and W. L. HARBESON for Hottell.

P. B. MAYFIELD and GAUT & GAUT for Browder.

FREEMAN, J., delivered the opinion of the court.

This bill is filed by the children and representatives of children of Elizabeth Simmons, deceased, against the purchasers of the land holding under a conveyance by their mother and father regularly executed.

The main question in the case, if not the only one, is whether the mother took an absolute estate under the will of her father, Alfred Castiller, with power to convey an unconditional fee in the same, or whether her children did not take, as purchasers under the will, on her death.

After providing that all his debts should be paid out of his estate, as soon as possible after his death, the testator says: "My will is that as soon after my death as possible, that my executor hereafter named advertise and sell all my farming implements and utensils, and all my stock on hand, consisting of what horses, hogs, cattle and sheep I may have on hand at my death, and the proceeds of the same I want paid to George W. Sallie in payment of a debt I owe him, and in case the proceeds of my stock and farming utensils should not be sufficient to pay it all, the balance will be paid out of any debts due me. After all my just debts are paid, as well as my funeral expenses, I will, bequeath and devise all the remainder of my estate, both real and personal, to my two daughters, Julia Calloway and Elizabeth Simmons, for their sole and separate use, share and share alike, free from the contracts, debts or liabilities of their respective husbands, *and in case of the death* of either of my said daughters above named, *then* my will is that all that part of my estate which hereby I give to her shall go and descend to her children."

This will was executed on December 15th, and probated January 5th, after. The draftsman tells us he was sent for to write the will, found the testator on his death-bed, and very low, unable to sit up, who told him he never expected to recover, and wished him to write his will, which he did.

The controlling rule, to which all others must bend in the construction of any will, is to ascertain the intention of the testator expressed in the paper. This

rule is grounded in the nature of the act to be done by courts in such construction, that is to construe a writing, authorized by law to be made, which purports to be a disposition of the property of a testator according as he wills to do. This will or intention must of necessity control, unless it contravene some rule of law forbidding it, or some well defined principle of public policy.

Although our books, especially our older ones, are filled with precedents prescribing in many cases arbitrary rules for ascertaining the meaning of testators—the practical common sense of more modern decisions, both in this country and England, has reached the conclusion given by Lord Selborne, Chancellor of England, in the case of *Wait* v. *Settlewood*, 4 Moaks' English R., 762, cited with approval by this court in *Traker* v. *Traker*, 6 Baxt., 352, that "there can be nothing more certain than that any will is to be construed by itself, not with reference to other wills, and all the light that can be got from other decisions serves only to show in what manner the principles of reasonable construction have, by judges of high authority, been applied in cases more or less similar." It was added in that case, "that in the application of all rules, the great leading idea is, and should be, to arrive at the actual intention of the testator and carry that out, unless in violation of some rule of law or public policy": *Id.* We do not think it necessary to go over the precedents on the question of the meaning of testators in other wills.

This intention is to be gathered primarily, if not

exclusively, from the language used by the testator, but in order to its proper understanding, we should put ourselves as near in his place as possible, and to do this may ascertain the circumstances surrounding him, the state and condition of his property, as well as his family, and objects of his bounty.

With these principles to guide us, putting ourselves in his place, and reading his language from this standpoint, it is impossible to reach the conclusion maintained by the respondents, that is that the testator meant by "and in case of the death of either of my said daughters above named, *then* my will is that all that part of my estate which hereby I give to her shall go to and descend to her children." The contention is, that the testator meant to provide for the contingency of either of his daughters dying before the testator. In view of the facts as stated, this conclusion is so far-fetched and so unnatural, especially when we see the daughters were both in perfect health, and had children, the latter, no doubt, well known to the testator, and objects of a grandfather's affection, as hardly to require an argument to refute it. No such thought, in the nature of things, could have been in his mind.

On careful consideration the principles of the case of *Alston* v. *Davis*, 2 Head, 268, involves a similar conclusion to the one we have reached. In that case, as in this, by the first clause of the will, an absolute gift was made "of all the rest and residue of testator's estate to parties named, at their death to be divided equally among their bodily heirs," which was held to

mean children. The contest was as to whether Mrs. Davis took an absolute estate, she having no children. It was held she did, because there being no other limitation over, except the one which failed, the absolute gift was not defeated, but took effect. The principle is thus stated by the court: "The general principle is well established, that where, by the will, an absolute gift of the property is made in the first instance, followed by a limitation over on the death of the devisee or legatee, the absolute gift is not taken away by the gift over, *unless* the gift over may itself take effect," page 268. Again the court say, page 269: "The gift is not subject to any other contingency or limitation beyond that expressed, *and* if that *cannot* take effect, the gift remains absolute." This clearly goes on the assumption, that if the gift over can take effect, then the first estate will be held subject to the condition, and if it shall occur, such limitation is effective to carry the estate to the devisee or legatee, notwithstanding the absolute gift in the first taker. Here the limitation over, in the nature of any executory devise, may take effect, because the first taker dies leaving children, and so they take under the rule laid down." In the case referred to the first taker, took an indefeasible estate because of the failure of Mrs. Davis to have children. For the opposite reason it is defeated in this case, because the first taker dies leaving children, who may take under the executory limitation.

The language of the will in the first part of the clause gives an absolute estate to the daughters, ex-

clusive of the marital rights of the husbands, with a conditional limitation over, in the nature of an executory devise to their children on the death of either of them. We cannot doubt this was the intention of the testator, from the language used, and this is rendered indubitable when the meaning of this language is sought in the light of the surrounding circumstances to which we have referred.

The result is, that the decree of the chancellor and report of the Referees holding the contrary is reversed, and a decree here in accord with the view indicated by this opinion.

It is earnestly insisted, however, that in this court the defendants, the present occupants of the land, are entitled to have so much of the purchase money paid by the purchaser, from Simmons and wife, as may be shown to have been properly applied to the payment of debts of the grandfather, Alfred Casteller.

It is claimed in the answer of respondents that debts over and above the personal assets, amounting to $1,246.48, were paid out of the proceeds of the land.

The principle underlying this view is that where parties purchasing lands the title to which fails, and the purchase money can be or is shown to have gone to discharge debts which cover a proper charge on the lands as against complainants recovering it, a court of equity will apply the rule that he who seeks equity must do equity and will subrogate the purchaser to the rights of the creditor so paid. This doctrine has been frequently applied by this court.

But the question is whether on the facts in this record the principle can be applied.

By another clause of the will of testator he provides as follows: "But in making the division between my said two daughters Julia and Elizabeth, R. J. F. Calloway, the husband of my daughter Julia, owes me one thousand dollars, and instead of paying it to my estate I want it deducted from Julia's share of my estate, and Julia to only have the balance of her half after the one thousand dollars is deducted from it. He also says, he had borrowed from Mrs. Cooper about $1,300, for his son-in-law Calloway, and gave his note for it, with Calloway surety." But the debt is, in fact, Calloway's; but in case my estate should have said debt to pay, then in that case my will is that the amount of it also be deducted from my daughter's share of my estate in making the division aforesaid."

The executor, J. H. Gaut, Esq., while he says it would have been necessary to sell a portion of the land to pay debts, yet says the only debt for which such necessity arose was the Cooper debt, as he recollects it. But in this we think he is probably mistaken, as the land sold for $6,500, part of this on time, it is true, and he shows most definitely that after paying all debts and charges of any kind against the estate he had in his hands $7,770.80, and paid over to Mrs. Simmons and Calloway the sum of $6,770.80—to Mrs. Simmons $3,885.40, and Mrs. Calloway $2,885.40. The difference in amount paid to the sisters, he says, was caused by the charge in the will of the one thousand dollars due by Calloway,

which he charged on Mrs. Calloway's share, as required by the will.

It is certain from these facts and figures that after paying all the debts on a final settlement, he had in his hands more than the amount the land sold for by the difference between $7,770.80 and $6,500, which is $1,270. It is probable this difference was absorbed by his costs and charges as executor, so as to reduce the amount for division which he paid the two sisters, to wit, the sum of $6.770.80. That this was the true amount due them there can be no question, not only from the known integrity and accountability of the executor in his business relations, but from the fact that he swears from the receipts of the parties as to the amounts, and shows that he had carefully examined the facts, and found that he had omitted to charge them with twenty dollars paid out in costs of suits during his administration.

With these facts in the record, and nothing to contravene them, it is clear there is no ground on which to sustain the contention of respondents, or basis for a reference on this question.

The respondents claim they have put valuable improvements on the land, and complainants ask an account of the rents, which, however, would be incident to their recovery any way.

Complainants will have a decree for possession of one-half the land with proper directions for its division, and will be entitled to reasonable rents for the same after the death of their mother. Respondent will be credited with the *enhanced* value of one-half

of the land at the time received by complainant, by reason of any such improvements then upon it.

The case will be remanded for this account, respondents paying the cost of this and court below up to this time.

13L 684
14L 325

ANDREW GIBSON *et al. v.* WM. E. JONES, Adm'r, *et al.*

1. PRINCIPAL AND SURETY. The right of action accrues to a surety when the debt is paid by the surety.

2. REAL ASSETS. *Purchaser from devisee.* A purchaser from an heir or devisee, must in order to avoid liability for the ancestor's debts; be able to show that the alienation was *bona fide*, which could not be the case, if he purchased with notice of debts due by the ancestor, that might be made a charge against the lands in the hands of the heir by any proceeding known to our law. Code construed, sections 1762, 1764, 2253 and 2256.

FROM SULLIVAN.

Appeal from the Chancery Court at Blountville. H. C. SMITH, Ch.

C. J. ST. JOHN and THOMAS CURTIN for complainants.

C. R. VANCE for defendants.

FREEMAN, J., delivered the opinion of the court.

This bill is filed, December, 1882, by complainants as creditors of David Hull, to subject a tract of land

devised by him to his wife for life, remainder to his children therein named, except one, Lucretia.

The facts necessary to be stated are, David Hull died in 1870, his wife, who had the life estate, in 1879. At March term, 1879, after the death of the wife, defendant, W. E. Jones, was appointed administrator *de bonis non* with the will annexed, there having been a previous administration, we take it, soon after his death. Hull left the tract of land of 160 acres, subject to the disposition of his will.

Adeline Hull, who had been a ward of Hull's, brought suit in the chancery court against the estate of Hull and his sureties, on guardian bond to recover monies in his hands as guardian and not accounted for. This case was successfully prosecuted, so that a decree was rendered against complainants in the present case as sureties for $844.36, by this court November, 1882. The estate of Hull, however, was held not liable, the defense of seven years having been interposed as a bar to the recovery sought. The sureties have paid this debt, and now file this bill against the devisees of the realty to subject the same to the payment of their debt, by way of reimbursement. It is shown there are no personal assets, and the devisees are made parties, together with the administrator Jones. He, in fact, is only made defendant by the terms of the bill in his character of administrator *de bonis non,* in order to have judgment ascertaining the amount of the debt against Hull's estate, and in order to enjoin a proceeding instituted by him, it seems, for the sale of the land, or his doing so

privately, as it is suggested he will do, in violation or without authority under the will.

Jones, however, answers the bill individually, and claims to have purchased the shares of three of the children of Hull, and that for this, with the reasons given in addition, the shares thus purchased by him, before suit commenced by complainants, these shares are not subject to complainants' claim. The chancellor has so decreed, and complainants have appealed. It is proper to say, that the other devisees, or those representing the other four shares made no defense, and the case is not before us as to them.

The Referees report against this decree, and recommend a reversal, to which respondent, Jones, files exceptions.

Several questions are presented by the exceptions, which are disposed of summarily together, as there is nothing in them to aid respondent. It is assumed in the answer that the claim of complainant rests on the doctrine of subrogation, and these sureties who have paid the debt due Adeline Hull from their guardian, are to be subrogated to the rights of Adeline. This is a mistaken view of the claim. Their claim is simply the ordinary claim of sureties, who have been compelled to pay the debt of their principal, and stands in this record alone on the ground of money paid for another, which he ought to have paid, and therefore a right to be reimbursed the sum paid. This being so, the statute of limitations having run in favor of the estate as against the claim of Adeline Hull, and the former adjudication to that

effect, as well as the other defenses urged, that might or should have been made to her claim by complainants, have nothing to do with their rights in the present case.

This suit is brought on the new right of action which accrued on payment of the money decreed against the sureties, and was brought a short time after the right of action arose, and that no statute of limitation runs, until a right of action accrues, is now axiomatic in our law. It suffices to say, that there is nothing in any of these questions.

The plea of former adjudication of the claim in that case is equally unfounded, as these complainants had no claim at that time to assert, asserted none, and their claim could not have been adjudicated in any way in that case, because not then accrued.

The only exception that does tend to raise a matter that might be tenable or present a question to us for decision favorable to respondent is the second one, which is because the Referees report that the three interests purchased by William E. Jones, as set out in his answer in his own right was liable to complainants' demands, and reversing the chancellor's decree holding them not liable. This exception, taken alone, is not a compliance with the statute creating the commission, section 6, requiring "specfic exceptions to the report, pointing out definitely the error or errors complained of, and accompanying these must be a brief, citing the testimony," etc.

This exception is to the conclusion reached or announced, and puts in issue the entire record, no

specific reference being given to any part of it. Taken, however, in connection with the first exception, it may by a liberal construction, be held to raise the question, whether a purchaser from an heir or devisee, *bona fide* before suit brought or process issued, with no notice of any claim which could be a charge on the land, gets a good title as against creditors of the testator or intestate.

The first exception is based in the first part of it, on the effect of the statute of limitations having run against the claim of Adeline Hull against the estate before purchased by defendant, and then adds, "before any lien or right had obtained against the same in favor of Adeline Hull or the complainants," he purchased the three interests for valuable considerations.

Giving this exception a liberal construction, it may raise the much mooted question in our State of the right of the heir or devisee to sell, and makes him liable only for the ancestor's debts to the value of the lands aliened: Code, sec. 2256 (old Code), new, 3094.

But that this question was not intended to be raised by the exception is shown by the fact, that in brief and argument filed in support of the exception there is no allusion to it, nor any reference to the section of the Code or our decisions upon it. On the contrary, the argument aimed to the point, first, that the statute of limitation of seven years had barred the claim against the estate, and had been so adjudged in the former case; and second, that Jones had purchased without notice of the claim of Adeline Hull.

As a matter of fact, the weight of the proof is

against respondent on this question of notice of some claim on the part of Adeline Hull, whether he had knowledge of its precise character is not so certain except that it grew out of the guardianship; and if so, then the claim now asserted by complainants would have been a necessary result of her assertion of that claim, and so, as she has asserted it, he is charged with notice of what has followed, and so the Referees report. This being so, the real question on the facts would be, whether a party who purchases from an heir or devisee lands, descended or devised, with notice of the fact that there exists a claim against the estate, which may be made a charge on the land, if personalty is not sufficient to meet it, can hold said land free from the debt, by reason of the title conveyed to him by the heir or devisee, and compel the creditor to go alone on the heir or devisee for the value of lands descended or devised.

There has been found much difficulty in settling the question in this State, or rather in the construction of our statutes on this subject.

We have in our Code, article 11, section 2252, title, "Real Assets," the general provision, taken from 5 George II., chapter 7, section 8, that "every debtor's property, except such as may be specially exempt by law, is assets for the satisfaction of all his just debts." Then follows the act of 1879, chapter 39, in four sections, 2253: "Where administration is granted to any person on account of his being a creditor of the intestate, and there are not personal assets sufficient to satisfy *the* debt or demand of such

administrator, he may prefer against the heirs or devisees of the deceased for the recovery of his debt, or demand, to the circuit court of the county, or chancery court of the district in which the administrator was granted a petition, setting forth the nature of the demand, and the amount of it, praying that the heir or heirs may be made defendants thereto.

Section 2254: "Upon *this* petition being filed in the clerk's office, the same proceedings shall be had, and the defendants shall be bound by and subject to the same rules as in other cases in equity."

Section 2255: "If a decree made against such heir or heirs, or any of them, execution shall be issued against the real estate of deceased debtor in possession of the heir or heirs against whom the decree is given." Then follows the provision of section 2256: "If an *heir* or devisee has aliened the land before suit brought or process sued out, he shall be answerable for the ancestor's debts, to the value of the land aliened."

These provisions apply only by their language and fair construction, down to the last section, to the particular case provided for, that is of an administrator who is a creditor. In strictness, perhaps, the last section would only apply to the same case, but may be construed as applying what was understood to be the general law of the State on the subject to this particular proceeding in favor of the creditor. We think the latter view the true one.

By section 1762, under title "Void Contracts," it is provided in substance, that all devises contrived to

defraud creditors of their just debts shall be void. It is then provided, section 1763, "such creditor may have and maintain his action against such devisee, and severally and jointly against him and the heirs at law of the debtor, in all cases, and in like manner, as such action can be brought or *maintained* against the *debtor's* heirs at law;" and then section 1764, "if the devisee sell, alien or make over the lands so devised, before action brought or process sued out against him, he shall be answerable for such debt to the value of the lands so by him sold, aliened or made over; and execution shall be taken out upon the judgment or decree obtained against him to the value of the said lands, as if the decree were his own proper debt. But lands, tenements and hereditaments, *bona fide* aliened before the action brought shall not be liable to such execution."

It is noticeable in these provisions, from 1762 to 1764 inclusive, that they are directed specifically to the case of a fraudulent devise of lands, as section 2253, and following are to the case of an administering creditor; yet it is incidentally provided, section 1763, "the creditor may proceed against the devisee, and jointly with him, the heirs at law, in the same manner as such suit could have been maintained against the debtor's heirs," thus assuming it was a matter of course against the heir. It is seen that where the proceeding is against the devisee the execution is taken out against him, as if the debts were his own, in case of alienation. It is then provided: "But lands, tenements and hereditaments, *bona fide*, aliened before

the action brought, shall not be liable to such execution.

This is for the protection of the purchaser, and when the lands purchased are sought to be reached for the debt of the ancestor, he must, in order to avoid the liability, be able to show that the alienation was *bona fide*, which could not be the case, if he purchased with notice of debts due by the ancestor, that might be made a charge against the lands in the hands of the heir by any proceeding known to our law.

It is true the language is, not "liable to such execution," but this must be held to include any legal proceeding intended to effectuate the creditor's right. Under our new liberalized system of remedies, giving the chancery court jurisdiction in the matters of debt, the present proceeding is a very proper one, treating it, as we have done, as against the purchaser, by reason of the complainant accepting his answer, and thus making him a party. All the rights and equities can be disposed of in the suit, saving costs and litigation.

The conclusion we have reached meets the main argument against the right of the heir or devisee to alien lands descended or devised, that they could sell at once to any one, being insolvent themselves, and thus get the money for the land, by a fraudulent disposition of it, and the creditor's claim on real assets be defeated. Such alienation under the principle herein announced must be *bona fide*, that is, without notice of debts, and if such notice exists, or can be

reasonably made out, then the purchaser will hold the land subject to such debts.

The result is, that the report of the Referees is approved, and chancellor's decree reversed with costs of this court.

C. A. SNAPP *v.* MATHEW V. PURCELL *et al.*

COSTS. *Chancellor's discretion as to.* The discretion of a chancellor as to taxation of costs is a legal discretion, and if not properly exercised may be reviewed and corrected by the Supreme Court.

FROM HANCOCK.

Appeal from the Chancery Court at Sneedville, H. C. SMITH, Ch.

F. M. FULKERSON for complainant.

MCDERMOTT & KYLE for defendants.

FREEMAN, J., delivered the opinion of the court.

This bill was filed to settle the estate of James L. Purcell, and in order to do this, have an account of advancements.

As said by the Referees, there is a large amount of irrelevant testimony taken, both by complainants and

respondents. The only questions presented in Referees' report by exceptions are, first, the correctness of allowing Mathew V. Purcell to hold about fifty acres of land under a parol gift, and adverse possession.

We have carefully looked through the mass of testimony on this question, and have no doubt of the correctness of the chancellor's decree and the report of the Referees. It would be a waste of time to collate this testimony. We simply state the result and affirm the chancellor's decree.

To the valuation of this land, as fixed by the chancellor ($425), both parties except; the complainant as not sufficient, and the defendant because too much. The testimony is conflicting, as is usual in such cases, but we think the chancellor has about reached the fair conclusion, and the report is approved on this question.

The Referees recommend a change in the taxation of the costs from that made by the chancellor. The exception to this is that the costs are in the discretion of the chancellor, by section 4493 of the Code, and this court has no authority to review it, unless there has been a palpable abuse of that discretion.

There is nothing in this exception—the discretion is a legal discretion, and if not properly exercised, when the whole case is brought before us by appeal to be tried *de novo*—this court has uniformly given such direction as to costs as it deemed proper.

The case of *The State and County of Davidson* v. *Lewis*, 10 Lea, 168, was whether appeal was taken solely for the purpose of reviewing the taxation of

costs and in such a case it was held we would not interfere with the action of the chancellor, except in case of clear abuse.

The report is approved and decree of chancellor affirmed, with the modification as to costs, as recommended.

A. W. FRANK *et al. v.* J. F. ANDERSON *et al.*

1. MARRIED WOMEN. A married woman may rely upon her coverture in bar of the liabilities of a firm of which she may have, during coverture, become a member.

2. PARTERSHIP. A partner may become a creditor of his firm, and the debt is his individual property, which he may assign or transfer to a third party, and in the absence of conflict with other creditors is entitled to be paid out of the partnership effects. The assignees, in such case, stands upon the same ground as other creditors of the firm.

FROM HAMILTON.

Appeal from the Chancery Court at Chattanooga. W. M. BRADFORD, Ch.

WHEELER & MARSHALL for complainants.

DEWITT & SHEPHERD for defendants.

COOKE, J., delivered the opinion of the court.

Respondents, Anderson and Burnett, were partners in a grocery store, in which Mrs. Lucy A. Watkins,

a married woman, purchased a one-third interest, paying $500 therefor. Soon afterwards, on November 29, 1880, respondent, Anderson, executed a deed of trust to J. I. Walton as trustee upon his one-third interest in said mercantile concern, and also conveyed in trust to said J. I. Walton as trustee for the benefit of J. W. and J. I. Walton a debt of $977, which said partnership owed him individually for goods of his own which he had sold to the concern. This trust was executed to secure an individual indebtedness of respondent, Anderson, to J. W. and J. I. Walton, and was registered on December 6, 1880. On December 14, 1880, respondent Burnett, with the consent of Anderson, executed a deed of trust to Betterton, trustee, upon the entire effects of the partnership, to secure various debts of the firm due to complainants and others, and among which were included a debt of $300 due to said respondent, Lucy A. Watkins, and the debt of $977 due to Anderson, and transferred or assigned, as before stated, to J. I. Walton, in trust for J. W. and J. I., and which in this trust is described as due to J. W. and J. I. Walton, and these two debts, with some other small ones, were preferred by the trust. The parties have all accepted the benefits of this last deed of trust; said Waltons also having accepted the first.

This bill was filed by complainants, Frank and others, while accepting the provisions of said last deed of trust, attacking these debts secured and preferred to Lucy A. Watkins and J. W. and J. I. Walton as fraudulent and fictitious, and seeking to exclude them

from any benefits under it, and have the partnership effects applied to the satisfaction of the debts of complainants. The partnership is insolvent, and the assets of the concern not more than sufficient, if that, to satisfy the preferred debts.

The defendants, J. I. and J. W. Walton and Lucy A. Watkins, demurred to the bill, which was properly overruled, the cause assigned being that they could not attack the deed of trust and at the same time claim a benefit under it. They then answered fully, denying all the allegations of the bill upon which relief was sought. Judgments *pro confesso* were entered against Anderson and Burnett. Mrs. Lucy A. Watkins admitted that she had undertaken to purchase one-third interest in the firm, for which she paid $500, which she says she is willing to lose, but says she was deceived and imposed upon as to the condition of the business, and avers she was a married woman, and not bound by her agreement to become a partner, and pleads and relies upon her coverture as a protection against any liability on account of the indebtedness of said firm. The proof in the record satisfactorily shows that she did pay $500 in cash for one-third interest in the firm, $300 of which went into the business of the concern, and $200 was paid to J. W. and J. I. Walton upon an individual debt of Anderson. The evidence also estabishes the fact that Mrs. Watkins loaned the firm $400 in cash, which went into the business, and they executed the firm note to her for the same, and which she exhibits; one hundred dollars of which has been paid, and the

remaining $300, with interest, is still due, and is the debt preferred in the trust deed. The testimony also establishes the fact that the firm was indebted to respondent, Anderson, in the sum of $977, which he assigned and transferred as befere stated to the Waltons, and which indebtedness was for goods sold by him to the firm, he having had the goods on hand when the partnership was formed, having that amount of goods in value over, after putting in a sufficient amount to make up his part of the capital. This is proven by Burnett, complainants own witness; and the only complaint he makes is that he now thinks Anderson charged too high for the goods.

Upon the hearing the chancellor denied the relief sought as against Mrs. Lucy Watkins, J. W. and J. I. Walton and the trustees, giving complainants a decree against Anderson and Burnett for their debts, and allowing them to participate or take under the trust according to its terms and provisions after the preferred debts are satisfied if any thing remained, and complainants appealed.

The Referees have reported that the decree should be affirmed as to Mrs. Lucy Watkins and reversed as to J. W. and J. I. Walton, and their debt excluded from the benefit of the trust, because as they say, Waltons are not entitled to participate in the assets of the partnership as assignees of one of the partners who is himself bound for all the partnership debts. The complainants have excepted to the report in so far as it recommends an affirmance of the decree as to Lucy A. Watkins, and J.

W. and J. I. Walton, have excepted to it so far as it recommends a reversal as to them.

We think the chancellor's decree was correct. Mrs. Lucy A. Watkins certainly had the right to plead her coverture against liability for the debts of the firm. She had paid into the concern all she had undertaken to pay, and consents to the entire loss of it. The balance of $300 due upon the note which she holds against the firm was for money loaned the firm by her as an individual, and we can see no reason why she does not stand in the same plight as to that as to any other creditor of the firm. To hold otherwise, would be to punish her for exercising the right which the law casts upon her for her protection as a married woman. Nor can we see why a partner may not be a creditor of his firm. The debt which it may thus owe him is his individual property, and is subject to his individual debts, and we see no reason why he may not assign or transfer it to a third party; and, while in the absence of conflicting claims of individual creditors, an individual cannot prove against a joint estate, in competition with the creditors of the firm, who are in fact his own creditors, and thereby take part of the fund, to the prejudice of those who are not only creditors of the firm but of himself: Story on Partnership, secs. 390, 405–6. Yet this debt subsists against the firm, and in the absence of any conflict with other creditors is entitled to be paid out of the partnership effects. He had a right to transfer it, and having done so before the insolvency of the concern, or at least before it was known, and with-

out fraud, we can see no reason why his assignee does not stand upon the same ground with other creditors of the firm. The fact of the debt having been assigned to secure a *bona fide* debt to Walton, while he thus became the legal owner of the debt, did not have the effect to make him liable for the partnership debts, and this being so, the principle of law cited above, and relied upon by complainants, has no application to him. At the time of these assignments it was competent for the firm to prefer creditors, and the complainant, having failed to establish any fraud in the transaction, it must stand.

It is also objected that the assignment having been made of this debt to J. I. Walton, although for the benefit of J. W. & J. I. Walton, the legal title to the debt being in J. I., as trustee, it was not in fact a debt due to J. W. & J. I., as described in the deed of trust to Betterton, trustee, and consequently they are not entitled to take under that trust. This objection is very technical; and it is a sufficient answer to say that all the parties, both trustee and beneficiaries, are before the court, and all recognized it as the debt of J. W. & J. I. Walton, as in equity it is. So we think there is nothing in this objection.

The report of the Referees will therefore be modfied, and the decree of the chancellor affirmed. The costs of this court will be paid by complainants, and of the chancery court as decreed by the chancellor.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

MIDDLE DIVISION,

NASHVILLE, ... DECEMBER TERM, 1884.

MRS. A. F. LINKS *v.* THE STATE.

1. PRACTICE. *Withdrawing evidence.* The practice of admitting incompetent evidence in the progress of trials, to be subsequently withdrawn, is disapproved, but is not of itself reversible error, unless it can be seen that a party has been injured thereby.

2. SAME. *Evidence. Criminal.* Evidence of other transactions than those charged in the indictment cannot, in general, be received, but where knowledge constitutes an essential ingredient in the guilt this rule is relaxed. In such cases transactions of a like kind with those charged in the indictment may be given.

FROM DAVIDSON.

Appeal in error from the Criminal Court of Davidson county. MATT. W. ALLEN, J.

T. A. ATCHISON, Jr., QUARLES, THOMA & TURLEY and T. L. DODD for Mrs. Links.

ATTORNEY-GENERAL LEA for the State.

COOKE, J., delivered the opinion of the court.

Mrs. A. F. Links, *alias* Miller, *alias* Myers, has been convicted of grand larceny, and appealed to this court. The property alleged to have been stolen was a diamond ring, the property of E. Wiggers, who was a jeweler, in Nashville. As is shown by the testimony, the defendant came into the jewelry store of Wiggers, on the morning of November 1, 1883, between the hours of ten and eleven o'clock, and asked to be shown an inexpensive diamond ring. A tray of that character was shown to her, being placed before her on the show case. She selected one that she said suited her, worth about $12 or $14. Said she wanted it for her niece, named "Mamie," and directed the name "Mamie" to be engraved in it, and, without being asked, paid $2, and said she would return in the afternoon and get it. She then asked for a more expensive diamond ring, and a tray containing that class of rings was placed before her on the show case, beside the tray first shown, at this time three gentlemen came into the store, to see the proprietor about a matter of business, and engaged him in conversation for a short time, during which his attention was diverted from the defendant and the diamonds. As soon as these gentlemen left the store, having remained about five minutes, the defendant asked to be shown some gentlemen's scarf pins, saying her husband was a druggist and she wished to present him with a pin. Wiggers then put the two trays of diamonds in the show case. She then said the

pins did not suit, and left the store. While in the store she gave her name as Mrs. Miller. She never returned for the ring she had directed to be engraved or the $2. Upon examination of these trays soon afterwards, it was found that a diamond ring, worth $85, had been taken from the tray of expensive diamonds, and a ring from the tray of cheap diamonds put in its place, and a stray, *chipped* diamond ring, which did not belong to the store, put in the place or niche from which the cheap diamond ring had been removed.

Upon leaving Wiggers' store, the defendant went to the jewelry store of one Stief, in Nashville, arriving there about eleven o'clock, where she gave her name as Mrs. Myers. She there called for diamond and turquois rings. A tray containing expensive diamond rings was placed before her on the show case. She wanted a ring for about $26. She was shown several rings. She selected an inexpensive diamond and turquois ring, and said she would take it, but wanted it made smaller. She said she wanted it for a niece. The clerk who was waiting on her then went forward to get the ring measured, and turned his back on her, leaving her and the tray of expensive diamonds in front of her on the show case. When the clerk returned to where she was, she had some money lying before her. She paid him, unsolicited, $1.50 on the ring, saying she would send a darkey for it at four o'clock that evening. The clerk then marked the price, $13, on the ring and immediately put the diamond ring tray in the case. She

then left. She was the only person to whom diamonds were shown that day at either store. Late that afternoon it was found that a valuable diamond ring, worth $185, was missing from the tray, and a strange ring, which did not belong to Stief, was there in its place, which was upon the next day fully identified as the $85 diamond ring that had been taken from Wiggers' tray as above stated, and for the larceny of which the defendant is indicted. She never sent for the ring she had ordered changed at Stief's, and upon which she had paid the $1.50, and for which she was to send at four o'clock that evening.

About ten days afterwards she was seen and recognized, as they state, by Stief and the clerk, Brenneke, who were on the lookout for her, in Nashville, upon a sleeping car going north on the Louisville & Nashville Railroad, and upon being approached by Brenneke and reminded that she had failed to call or send for the ring she had engaged, denied being the person referred to, or ever having engaged a ring of him. Said she was mistaken, that she was just passing through from New Orleans, and knew nothing about it.

Shortly thereafter she was arrested in Louisville, Ky., upon a requisition of the Governor. She was at a place called St. Joseph's Hospital, or Infirmary, where her husband, or a man named A. F. Links, who claimed to be her husband, was being treated for a diseased foot. Upon being informed of the charge upon which she was arrested, she denied having been in Nashville; said she had left Louisville

on November 1st, and had gone straight through to New Orleans upon a through ticket, and had made no stop any where, and that she had not stopped in Nashville, only to be carried from one depot to the other in a hack. There were two trunks in the room she and her husband were occupying. These trunks were opened and examined, and in the one which contained ladies' apparel, etc., there was found a pawn-broker's ticket, dated Atlanta, November 2d, 1883, which acknowledged the receipt of a diamond ring from Mrs. A. F. Links, to be expressed to her at Charleston, S. C., upon the receipt of $25. Upon being shown this ticket, and told that it showed that she had not gone straight through to New Orleans, she then admitted that she had not, but said she had got out of money, or needed some money, and had stopped in Atlanta and pawned a ring for $25. Upon being told that the register at the infirmary showed she had left Louisville at half-past two o'clock October 31st, and consequently she could not have left on November 1st. She admitted that she was mistaken, and that she had left Louisville on October 31st. After having been arrested she was requested to show her jewelry. She said it was deposited in a bank in the city. She started with the officers to go to the bank, but, before going very far, she said her jewelry was not in a bank, but in the possession of a certain lady at a hotel. Upon being accompanied to the hotel she inquired for the lady named, and was told that she knew that lady was not boarding at the hotel. She then said the lady was to

come to the infirmary that evening to take a ride with her, but no such lady came, until half-past four o'clock, when the officer and guard left with her for Nashville.

It was also proved by a witness named Allen, that on November 3, 1883, the defendant came to the jewelry store of his father, in Charleston, S. C., and asked to see diamond rings. She was shown the rings, and selected a small, inexpensive diamond ring, and ordered a name to be put into it, saying she would call for it that afternoon at four o'clock. She said her gold spectacles were bent, and left them to be repaired, saying she would call for them at the same hour. They were smoked glasses, such as she was proven to have worn at the hotel while in Nashville. She never came back for the spectacles, nor did she call for the ring. He saw her again that afternoon on the streets in Charleston. Within a day or two, or it might have been a week, the witness is not certain as to length of time, but thinks it was a short time, they missed a soltaire diamond ring from the tray shown the defendant.

There are many other facts and circumstances of more or less significance that might be mentioned, but it is sufficient to say that the testimony, as to the larceny, by the defendant, of the ring charged in the indictment, is ample to sustain the verdict, and it will not be disturbed, unless for error committed during the progress of the trial, or in the charge of the court. Numerous errors, however, have been assigned, and are very earneslty insisted upon for reversal.

The testimony of Steif as to the loss of his ring, in the place of which the ring in question was found, was objected to by the defendant as tending to show a separate and independent felony committed by the defendant from that charged in the indictment, and for which it was shown another indictment was pending against the defendant, but the testimony as above detailed was admitted over the objections, and defendant excepted. We do not understand, however, the objection to this part of Steif's testimony to be very earnestly pressed. It is sufficient to say that in tracing the ring in question which had been stolen from Wiggers, to the defendant, it was necessary to show all the facts and circumstances as to how it came into Steif's possession, and it is difficult to see how this could be done without disclosing the fact that the ring of Steif in the place of which Wiggers' ring was substituted, had been removed, and was necessary to be done in showing that Wiggers' ring was left in its place by the defendant. The Court gave the jury the proper instruction as to the effect of this testimony, as will be hereafter seen. The same witness, Steif, was permitted, over the objection of the defendant, to testify that the defendant had been in his store on two different occasions a year or more before the 1st of November, 1883, and after each time that she was there he missed diamond rings. But on cross-examination the witness stated that he could only recognize her as the person that was in the store on those occasions by occurrences that have transpired since, whereupon the court withdrew this testimony en-

tirely from the jury. It is insisted, however, that notwithstanding this withdrawal of the testimony by the courts, the jury having heard it, its effect upon them could not be withdrawn, but the error in admitting it was irreparable to the defendant, and the cause should be reversed and a new trial granted for that reason.

There can be no doubt, we think, but that this testimony, as stated in the bill of exceptions, was incompetent and should not have been heard, as no artifice or device is shown to have been used by the defendant on these occasions, even if she had been identified sufficiently, by which she obtained, or sought to obtain, the opportunity of stealing rings, the same or similar to that resorted to upon the occasion of obtaining the diamond ring in question. The practice of admitting incompetent evidence in the progress of trials, to be subsequently withdrawn, has been often disapproved by this court, and its probable or possible injurious tendencies commented upon, but we are not aware of any case having been reversed for that cause alone; nor unless it can be seen that a party has been injured by it, do we think a reversal should be had for that cause.

We can see no evidences in this record of any such injury having been done the defendant. The testimony of the witness Allen, above recited, was objected to by the defendant as tending to establish a wholly separate and distinct larceny by the defendant from that charged in the indictment, or to cause her to be suspected of a separate and distinct criminal

offense. The testimony admitted over the objection was, as we have already seen, that on November 3, 1883, she entered the jewelry store of the father of the witness, in Charleston, and asked to see diamond rings; was shown rings, and selected a small, inexpensive diamond ring, and ordered a name to be put into it, saying she would call for it at 4 o'clock that afternoon; said her gold spectacles were bent, and left them to be repaired, saying she would call for them at the same hour. She never came back for either the spectacle or the ring. A short time thereafter, or in a few days, a soltaire diamond ring was found to be missing from the tray of diamonds that had been shown to her.

The court instructed the jury in regard to this testimony, as follows: "If, in the introduction of evidence to sustain the indictment, the relation of facts and circumstances are necessarily involved which show, or tend to show, that the defendant committed a separate or independent offense, if it was defendant, and became connected with the commission of the crime under investigation so as to be a part thereof, it may be taken as evidence tending to show the guilt of the defendant of the latter crime, but when they are not so connected so as to be a part of the transaction under trial, they can only be looked to for the purpose of showing the identity of the defendant to show where the crime has been established in the case when committed, by artifice and stratagem, the guilty knowledge of the defendant, and to show a part of a particular system of committing crime, when the ex-

traneous misconduct is of the same character, and by the same artifice and stratagem as the one under consideration."

The above instruction, we think, is a correct exposition of the law in relation to the testimony in question.

The necessity of enforcing the rule that the evidence must be confined to the point in issue, and that no evidence can be admitted, which does not tend to prove or disprove the issue joined, is stronger in criminal than in civil cases. The facts proven should be strictly relevant to the particular charge, and have no reference to any conduct of the prisoner unconnected with such charge. But this rule has its qualifications, equally as well established as the rule itself, upon principle and authority: *Butt* v. *The State*, 9 Hum., 40; *Defrees* v. *The State*, 3 Heis., 64; *Shaw* v. *State*, 3 Sneed, 87; *Wiley* v. *State*, 3 Cold., 343.

Evidence of other transactions than those charged in the indictment cannot, in general, be received; but where knowledge constitutes an essential ingredient in the guilt this rule is relaxed. In such cases transactions of a like kind with those charged in the indictment may be given in evidence: *Powers* v. *State*, 4 Heis., 272.

Thus, upon an indictment for passing counterfeit money, proof that the defendant knowingly passed other counterfeit money at different times is admissible: 2 Hum., 78. Or upon indictment for receiving stolen goods, knowing them to be stolen, evidence of other like offenses: 3 Heis., 116.

In *Garner* v. *The State*, it was held upon an indictment for forgery, evidence of the passage by the defendant of other similar forged paper was admissible to show the scienter: 5 Lea, 213.

In *Defrees* v. *The State*, 3 Heis., 53, it was held that obtaining property by any fraudulent trick or device was larceny, and that where guilty knowledge is to be proved other acts of the prisoners may be admitted, though they amount to substantive felonies or attempts to commit felonies. That was an indictment for robbery, which consisted in obtaining a watch from the prosecutor by means of a trick called the five-cent trick, which was accomplished by concealing a five-cent piece in a split card, and then wrapping or folding up in it another five-cent piece. This was then dropped, as if by accident, in view of the victim, and picked up and unfolded by an accomplice and the five cents folded in it taken out and the card refolded, and the attention of the party dropping the card called to it, who stated it had a five-cent piece in it. This being disputed or questioned by the other party, he offered to bet that it did contain a five-cent piece, whereupon the victim, having seen a five-cent piece taken out when the party offering to bet was absent, was induced to bet his watch that there was not a five-cent piece in the card, whereupon the defendant tore open the card and exhibited the other five cents, and ran off with the prosecutor's watch.

It was not only held that this was robbery, but that evidence of these parties having perpetrated or

attempted to perpetrate the same *trick* upon other persons at different times, was admissible to show that the scheme by which the possession of the property was obtained was an artifice or stratagem designed to be practiced generally in order to obtain the property of such victims as could be thus cheated. The question under consideration falls very clearly within the principle decided in that case.

It is very clear that the pretense of desiring to purchase an inexpensive ring for a present for a relation, and the pretense of making the purchase, and leaving the ring to be engraved or altered, and leaving money as an advance upon the same or something of value behind to be called for later, and manifesting a desire to purchase valuable rings, was a mere stratagem or device contrived by the defendant to afford her an opportunity of obtaining possession of valuable diamonds, rings, etc., and of getting away without being suspected or closely watched, and the evidence was competent to show that in thus obtaining possession of the ring in question, it was intentional and with a purpose to steal it, and was not an accidental exchange of rings by mistake while examining and comparing them, or, in other words, as expressed in the books, to prove the scienter. This applies equally to the evidence of Stief, disposed of upon other grounds. The testimony was properly admitted and the instructions of the court in relation to it substantially correct. It is insisted, however, that although this may be so as to separate independent felonies of like character committed by the same artifice or device,

yet the rule cannot apply to cases where no separate felony has been shown to have been committed, but only such facts shown as tended to raise a *suspicion* that the defendant might have committed another separate felony, and that this was the only effect of Allen's testimony, and hence it was error to admit it. It is a sufficient answer to this to say that the evidence tends very strongly, if not conclusively, to show that a larceny was committed, but if it did not, in the case of *Defrees* v. *The State*, above referred to, it was expressly held that evidence of the commission or *attempt to commit* a like felony by the same artifice or device, was admissible, which disposes of this question. Besides there can be no difference in principle.

It is next insisted that the court erred in charging the jury as to the law of *alibi;* not that the law upon this subject was incorrectly charged, but that, as is insisted, no such defense was made for the prisoner. But she did deny that she was in Nashville on the day the larceny was committed; and then that she was in that city on that day except to pass through from one depot to the other; and denied that she was at the store of either Wiggers or Steif; and these denials were in evidence before the jury; and if that were not so, it is difficult to see how the defendant could be prejudiced thereby. She could not attempt to introduce any proof as to her whereabouts on the day or at the time the larceny was committed, but denied as above stated that she was ever at these jewelers'. Her identity is, however, very fully, and we think conclusively, established as the person who was there and

committed the larceny. This is not like the case of *Gray* v. *The State* furnished us in manuscript. There a mule was stolen in Clarksville, and the State proved by certain witnesses that the prisoner was seen upon the next day after the larceny was committed riding the mule in Robertson county, a distance of twenty or twenty-five miles from Clarksville. The defendant not only admitted that he *was* in Clarksville at the time the mule was stolen, but proved by ten or a dozen witnesses that he was also in Clarksville on the next day, at the time the State's witnesses testified to having seen him riding the mule in Robertson county. Judge Nicholson, in that case, said it was not a question of *alibi* at the time the mule was stolen, but was a conflict of evidence as to the identity of the person seen riding the mule on the next day, and the certainty and satisfactory character of proof to sustain an *alibi* did not apply to the question presented by that record. That case has no application, that we can see, to the one now under consideration.

It is next insisted that the court erred in his charge to the jury upon the subject of larceny. The court gave the jury a very full, clear and minutely correct charge upon the subject of larceny, in all the phases presented by the evidence in the cause and the theories of the defense, and which is admitted by the learned counsel for the defense to be strictly accurate and correct, and then adds the following words: "Now, gentlemen, what all this means, as applied to this case is, that if the

defendant went into Wiggers' store and took out a diamond ring or the ring that may be established and described in the proof, and carried it off, and this was done without the consent or against the will of Wiggers, without any claim or shadow of right to do so, in Davidson county, and he was the owner of the ring, either general or special, *as explained*, and the ring had some value, before the finding of the indictment, she would be guilty of larceny, unless some explanation is made of such conduct in the proof going to show that such conduct was not criminal." It is insisted that as some of the elements necessary to constitute larceny are omitted in this instruction, its effect was to withdraw from the jury the very full and accurate instructions previously given them in the charge. We do not so consider it; but while the instruction objected to was wholly unnecessary, and might have been omitted altogether, its manifest object was to call the attention of the jury to the main leading facts necessary to be established by the proof in order to render the defendant guilty, and the words "as explained," at the bottom of the instruction, evidently refers the jury to the full and accurate instruction as given in the paragraph of the charge immediately preceding, and in view of the evidence and the theory of the defense, the facts to which the court called the attention of the jury could not have been found by them or existed consistent with her innocence. And as full and accurate instructions had been given in the former part of the charge and no request that they

should be repeated in this connection, we do not think this was error.

It is also insisted that it was error to admit testimony as to the contents of the trunk that was opened in the room occupied by the defendant at the time of her arrest, and which contained articles of ladies' wearing apparel, and also ladies' wigs of different colors, as well as some jewelers tools used for removing and inserting diamond sets in rings, etc., and in which the pawn-broker's ticket was also found. It is said that this was not shown to be the defendant's trunk, and for that reason the testimony was improperly admitted. This trunk was in her room—was shown to be about the same size, structure and color of the trunk she had at the depot in Nashville on the day the larceny was committed, it was treated and spoken of as her trunk. She did not disclaim it, but when told that the pawn-broker's ticket had been taken out of it and settled that she had stopped in Atlanta, she assented to it, and explained that she had stopped in that city and pawned a diamond ring for $25. These facts sufficiently establish that the trunk was hers.

We have investigated this record, and the questions raised and argued by defendant's counsel, with as much care as we have been able, and are fully satisfied that it contains no error. The jury have dealt as lightly with the defendant as possible under the law. We have no doubt as to her guilt, and the judgment must be affirmed.

FREEMAN, J., and WILSON Sp. J., dissent.

C. H. EASTMAN, Clerk, *v.* THE MAYOR AND CITY COUNCIL OF NASHVILLE.

CORPORATIONS, MUNICIPAL. *State tax collected by.* The tax upon cases tried in municipal courts is to be paid by the parties convicted, and is not a tax imposed upon the city or in the exercise of one of its agencies or powers, nor is it costs in cases tried before these courts. A party convicted in these courts cannot be imprisoned to secure the payment of this tax. The tax is to be paid by the party found guilty.

FROM DAVIDSON.

Appeal in error from the Circuit Court of Davidson county. FRANK T. REID, J.

LYTTON TAYLOR for Eastman.

J. C. BRADFORD for Nashville.

WILSON, Sp. J., delivered the opinion of the court.

This was an application of relator, as clerk of the county court of Davidson county, for the writ of *mandamus* to compel the officials of the corporation of Nashville to pay to him revenue alleged to be due the State, arising from the privilege tax imposed by the revenue act of March 3, 1883, on cases submitted or tried before the municipal or police court of the city.

Numerous objections were taken in the circuit court, as to the sufficiency of the petition or as to the right of relator to proceed by *mandamus*, and the

proceedings were dismissed there, as to Ewing, judge of the city court, and Bell, recorder of the city. We are relieved from an investigation of these objections by the statement of the city attorney made here that they are not urged or relied on, as the city desires to have the questions raised settled upon their merits.

The old corporation of Nashville expired under the act of March 21, 1883, on the second Thursday in October, 1883, at eight o'clock, A. M., and the present municipal government, under the same name, came into existence upon its legal demise, subject to all its liabilities, and invested with the title, right to all its property, uncollected taxes, dues, claims, judgments, decrees and choses in action: Act of March 5, 1883, section 2; act of March 21, 1883, sections 58 and 59. Under the extinct city government, the municipal or police court was called the recorder's court, under the present this court is designated, in the creating act, the "city court," but under both, the recorder's court under the former, and the "city court" under the latter, are essentially the same, and their powers and jurisdiction were given to secure the same end.

The fourth section of the revenue law, passed March 3, 1883, in the privileges therein enumerated and taxed, imposes a privilege tax of $1 on "each case before a mayor or recorder's court, or before any police court having jurisdiction of offenses in any taxing district in the State," and provides that the officer collecting the tax on litigation, and "the officer

holding the police court in the towns and cities in the taxing districts of this State, shall report the amount collected by them every thirty days and pay the same over to the clerk of the county court, taking duplicate receipts, one of which shall, without delay, be forwarded to the comptroller."

This act was in force from its passage, and it appears that, from its passage until the extinction of the old city government, many cases were tried before its police court. In some of the cases convicted, defendants paid in money the fines and costs, and also the State tax; in others, in default of payment, they were sentenced to the city work-house to work out this fine and costs. It also appears that quite a number of cases were tried before the "city court" of the present existing city government, *after* the extinction of the old corporation, *and before* the petition for *mandamus* was filed in this cause. And, as in the case of the old, some of the parties convicted in the "city court" paid, in cash, their fines and costs, and also the State tax. Other defendants thus convicted, in default of payment, were sentenced to the city work-house.

In the progress of the trial below, the city admitted a liability to the relator in the sum of $754, the amount, as it claimed, of State tax collected in cash from defendants tried before its "city court," and before the recorder's court of the old municipality, and not theretofore paid over, and stated its readiness and willingness to pay the same. The court directed it to pay in to court such sum as it admitted to be

due, and that the judgment thus made should be a discharge of its liability to this extent.

The trial judge held that the city was liable to the relator for the State tax in all cases tried before its city court or before the recorder's court, where tax had been paid in money, and in all cases where defendants had been sentenced to the work-house, and confined therein and worked for a sufficient time to pay the fines, costs, and also the State tax, upon the allowance or credits for such costs specified by law.

Upon the admission of relator, that he could only prove the number of cases tried, and from this number the cases in which the taxes had been actually paid, and those in which the defendants had been sentenced to the work-house, the trial judge, on trial rendered judgment against the city for $754, directed the same to be paid within a given time, and dismissed the petition at the cost of the relator, who has appealed to this court.

The contention of relator is, first, that the State is entitled to receive from the city $1.00 in each and every case tried before its municipal court; in other words, that this tax is a tax imposed upon the city or upon the exercise of one of its municipal franchises or functions; and, secondly, if mistaken in this view, that the State has the legal right to demand the $1 in every case where it is actually paid, and in every case where defendants are convicted and sentenced to the work-house.

His claim, with regard to this precise point, if we understand the argument of the learned counsel, is

that if a party tried before the city court is convicted and sentenced to the work-house to work out the fine and the costs, his work must be first applied to the payment of the State tax; and as the city, in the view of the law, gets the benefit of his labor, it must pay the tax, although the party be discharged before he has been confined or worked a time sufficient, under the provisions of law, to pay the fine and cost, and the State tax.

This contention rests upon the idea that this tax is a part of the costs in this class of cases, or that the defendant municipality has the power to imprison parties bringing themselves within the scope or purview of its application, and thus compel them to its payment by enforced labor done for its benefit.

It may be conceded that the Legislature has the power to impose a privilege tax on suits or litigation tried in city or police courts for a violation of city ordinances, and to direct its payment by the city. But the presumption is against the evidence of such tax, because cities or municipalities under our form of government, are in one sense political agencies of the State; and although their property or franchises are not exempt from taxation in their charters, or in the organic law of the sovereignty creating them, there is an implied exemption, and in order to subject them to taxation, the legislative intent to do so must be clear and certain: *Mayor and Aldermen of Nashville* v. *Bank of Tennessee*, 1 Swan, 269; Desty on Tax., vol. 1, page 301; Cooley on Tax., page 55, note 1 and authorities cited.

Applying this rule to the legislation creating the corporation of Nashville, and to the revenue law imposing the tax in controversy, it is clear, we think, that it was the intention of the Legislature that the tax was to be paid by the parties convicted in the municipal courts, and that it was not a tax imposed upon the city or the exercise of one of its agencies or powers. Nor is it costs in cases tried before the municipal courts: *Elliston* v. *Winstead*, 10 Lea, 473, and authorities there cited. And therefore, under the provisions of the law creating its present municipal government, it has no power to imprison a party, convicted in its police court, to secure the payment of this tax, but only to secure the fine and costs: Sections 21, 22, 27 and 53, Act of March 21, 1883.

This disposes of the points raised by counsel for relator. The defendant insists that its court is known as the "city court" in the act incorporating the present municipal government, and that it is not a mayor or recorder's court, nor a police court having jurisdiction of offenses in any taxing district in the State, and therefore, that cases tried before it are not within the letter or meaning of the section of the revenue law imposing a privilege tax of $1 on each case tried before said courts.

This is sticking in the bark. Revenue laws should not be liberally construed or expanded so as to make them embrace subjects or objects not intended, but, unless the language used in them prevent, so as to give effect to the obvious intent of the Legislature: Desty on Tax., Vol. 1, p. 102; Cooley on Tax., 198–199.

And we think, although the particular portion of the act of March 30, 1883, imposing this privilege tax and providing for its collection, is loosely and inartificially worded, that it was the obvious intention of the Legislature to impose a tax of $1, to be paid by the defendant found guilty on each case tried before mayor or recorder's courts or the police courts of cities, towns and taxing districts. As we have stated, the municipal court of the defendant, although called the "city court," is essentially the same in its powers and jurisdiction as those specifically named in the act.

The result reached by the court below in this case was correct, and his judgment will be affirmed, except, that the costs of the court below will be taxed to the defendant. The costs of the appeal will be paid by the relator.

C. H. EASTMAN, Clerk, *v.* WM. LITTERER.

TAX, PRIVILEGE. *Merchant.* Although a merchant's license be issued for a year under the act of 1883, chapter 105, yet if the business be terminated sooner, as for example, by fire, the license and the tax should, under the act of 1883, chapter 29, be limited to the period of the actual exercise of the privilege, counting by quarters of the year.

FROM DAVIDSON.

Appeal in error from the Circuit Court of Davidson county. FRANK T. REID, J.

ATTORNEY-GENERAL LEA for Eastman.

LYTTON TAYLOR for Litterer.

COOPER, J., delivered the opinion of the court.

An agreed case, from which it appears that Wm. Litterer was a merchant, in Nashville, whose place of business was destroyed by fire during the first quarter of the year 1883. He made a tender to C. H. Eastman, as clerk of the county court, according to the agreed statement of facts of "a quarter's license," by which, it seems, is meant what would be due for a license to trade as a merchant for one-fourth of the year 1883. The clerk refused the tender, upon the ground that he could only issue a license for a year. The circuit judge was of opinion that the tender was good, and gave judgment for the amount of the tender. Eastman appealed in error.

The question which has been argued is whether the clerk of the county court can lawfully issue a merchant's license quarterly, or must issue it for the entire year. The act of the Legislature of 1883, chapter 105, section 16, provides that merchants shall pay an *ad valorem* tax upon the capital invested in their business equal to that levied on taxable property, as well as a privilege tax on the vocation; and by section 20, sub-section 2, the word "capital," as used in the foregoing sections, shall be construed to mean the largest amount of stock on hand at any one time in the year where it is offered for sale. Section 17 provides that no merchant shall commence

and continue a business in any county of this State, without obtaining a license from the clerk of such county in accordance with the provisions of the act. Section 18 is: "That every merchant applying for license shall, before receiving the same, execute a bond to the State, with good security, to be approved by the clerk of the county court, conditioned that such merchant will render to the clerk issuing the license, at the end of twelve months from the date of the bond, a true statement, under the oath prescribed by this act, of the amount of capital invested in such business during said twelve months, and will pay to the clerk the tax thereon." The act of 1883, chapter 106, section 3, is: "That merchants shall pay an *ad valorem* tax upon the capital invested by them of forty cents on each one hundred dollars, and a privilege tax of thirty cents on each one hundred dollars of taxable property; provided, that such privilege tax shall in no case be less than five dollars; and they shall pay a privilege tax of ten cents on each one hundred dollars of their capital so invested for school purposes." Both of the foregoing acts were approved by the Governor, and went into effect on March 30, 1883. On the 9th of the same month another act, passed by the Legislature, had been approved by the Governor, and gone into effect, being chapter 29 of the printed acts, the first section of which reads as follows: "That it shall be lawful for clerks of the various county courts in the State to issue license by the quarter for the exercise of any privilege under the laws of the State."

If we look alone to the act of 1883, chapter 105, it is clear that while sections 16 and 17, which fix the merchant with a property and privilege tax and require him to take out a license, do not prescribe the time for which the license shall run, the following sections do give directions which contemplate a license for a year. They expressly provide, as a condition precedent to the issuance of a license, the execution of a bond by the merchant conditioned for the making by him, at the end of twelve months from the date of the bond, of a true statement of the amount of capital invested in the business during the twelve months. The statute goes further and provides that the "capital," upon which the merchant is to pay an *ad valorem* and a privilege tax, is the largest amount of stock on hand at any time in the year. Obviously, the clerk cannot issue a license for one-fourth or one-half of the year, because the "capital" might be less in one-quarter than in another, whereas the statute requires that the tax for each quarter shall be based upon the largest amount of stock on hand at any one time in the year.

These several acts, being all passed by the same Legislature and *in pari materia*, must, however, be construed together, and harmonized, if possible. Implied repeals are not favored, and the acts of March 30, 1883, do not in express terms repeal the act of March 9th. The latter act, in plain words, authorizes clerks to issue a license by the quarter for the exercise of any privilege under the laws of the State. If the tax can be ascertained in advance, the license

may, under the statute, be issued for the shorter period. If it cannot be thus ascertained, and it is clear that it cannot be in the case of the merchant who goes into business for an indefinite length of time, the license must be for the year. The record does not show the fact, but that was probably what was done in the case before us. And the real question is whether, if the merchant cease to do business within the year, the license and the tax may be cut down to the shorter period. Such a construction of the statute is in accord with the spirit of the whole legislation, and not actually violative of the letter of any part of it; for the provisions of chapter 105, fixing the tax and requiring the license, do not prescribe the time the license shall run, and the subsequent sections are directory, providing for the case where the business is carried on for a year. The license and the bond are merely modes of definitely ascertaining the amount of the tax, without necessarily determining the time of the exercise of the privilege. If, in fact, carried on for less than a year the license and the tax should, under chapter 29, be cut down to the period of actual business, counting by quarters.

The judgment is therefore affirmed.

13L 728
15L 199

A. P. GRIMSTEAD, Adm'r, *v.* W. E. HUGGINS *et. al.*

CHANCERY PLEADINGS AND PRACTICE. *Administration. Insolvent estate.* If, in the administration in chancery of an insolvent estate, the realty be subject to vendors' liens which are enforced in the suit, and the administrator collects the rents, and, in settlements made under orders of the court, is charged with such rents and allowed his disbursements thereof in the payment of debts and expenses of administration by decrees rendered from time to time in confirming reports by the master of such settlements, the reports not being excepted to, neither the court below nor this court upon appeal by the minor heirs of the deceased, can go behind those decrees, the heirs being all the time before the court by guardian *ad litem*.

FROM DAVIDSON.

Appeal from the Chancery Court at Nashville. A. G. MERRITT, Ch.

J. P. HELMS for complainant.

COVINGTON & ATCHISON for defendants.

COOPER, J., delivered the opinion of the court.

W. E. Huggins died in 1865, leaving a widow and four children. The widow qualified as administratrix of his estate, and acted as such, but without making any settlement of the administration, until her death in 1868. Before her death she seems to have suggested to the county court the insolvency of her husband's estate. After her death A. P. Grimstead was appointed and qualified as the administrator *de bonis non* of the estate of W. E. Huggins. On

September 29, 1868, he filed the original bill in this cause against the children and creditors of his intestate, to remove the administration of the estate from the county to the chancery court, and to settle the same as an insolvent estate. Such proceedings were had in the cause that the insolvency of the estate was ascertained and declared, the debts ascertained, the realty sold, and the assets distributed. A. P. Grimstead died, and the cause was revived on July 20, 1883, against A. J. Roper, as his administrator, over his protest, and a reference made to the clerk and master to report the real estate of which W. E. Huggins died possessed, the amount received therefrom by A. P. Grimstead, and the taxes paid by him. The master made a report accordingly, from which it appeared that Grimstead had collected, between 1868 and 1873 inclusive, a certain amount of rents after deducting taxes paid. The children then moved for judgment against A. J. Roper, as administrator of Grimstead, for the net balance of rents thus found. But the chancellor was of opinion, and so decreed, that these rents had been reported to the court as collected and paid out on the debts of the estate in the administration suit, and that these reports had been confirmed by the court without exception, the rights of the parties being thereby concluded. The children appealed.

W. E. Huggins had died seized and possessed of three tracts of land, each of which was encumbered with a lien for unpaid purchase money, in satisfaction of which they were sold. He had sold two other

tracts of land, treated as one tract, to one B. C. Towns, and had in his life-time filed a bill to enforce his vendor's lien thereon for unpaid purchase money. They were sold accordingly, Grimstead, as administrator, buying them in for the benefit of the estate. As to these two tracts of land, it is clear that Grimstead held them, as he held the claim for unpaid purchase money, as assets of the estate for the benefit of creditors. The children would have no interest in these lands or their rents and profits until the debts were paid. The other tracts were subject to liens of vendors, who were proceeding by bills or cross-bills to enforce these liens. There is evidence tending to show that the chanceller had appointed Grimstead a receiver to take possession and rent the lands under these bills, but no entry of the appointment was made until 1874, when the order recites generally a previous appointment, and purports to be *nunc pro tunc*. There is also evidence that during this period it was supposed that the real estate would more than pay the debts. On April 21, 1869, the clerk and master, in pursuance of an order made for the purpose, made a report of a settlement with the administrator, in which the administrator was charged with assets received, including rents for the years 1868 and 1869, and allowed certain disbursements, which report, not being excepted to, was confirmed. On July 27, 1874, the clerk and master, upon like order, reported another settlement, in which the administrator was charged with the balance on the previous settlement, and subsequent collections, including

the rents for the years 1870, 1871, 1872 and 1873, and allowed his disbursements and compensation, leaving a balance in his hands of $482.43, which report, being unexcepted to, was also confirmed. Subsequent reports, confirmed because unexcepted to, show the disbursement in the payment of debts of this balance.

If it be conceded that Grimstead was acting in the collection of rents under a mistaken idea that he had been legally appointed receiver, and if it be further conceded that the entry in 1874 of his appointment *nunc pro tunc* was of no avail, yet he made settlements under decrees of the court in which he charged himself with these rents, and was allowed credit for the disbursement thereof in the payment of the debts of the estate and expenses of administration. These settlements were reported to the court and confirmed without exception. The children of W. E. Huggins, the present appellants, were properly made parties to the suit, and appeared and answered by guardian *ad litem* regularly appointed. It is very clear that the chancellor, in the year 1883, could not, in the same suit, go behind these decrees and make a different disposition of the funds. Nor do we see how the children are in any better condition upon an appeal, even if it brings up for revision those decrees. For the reports, not being excepted to, were properly confirmed. There is no error in them of which the parties, who did not complain then, can now complain. The reports being unexcepted to we are as much bound to confirm them as was the chancellor.

Affirm the decree with costs.

J. C. WANDS and WIFE *v.* M. M. BRIEN.

1. TAX SALE. *Description.* A tax sale of less than the whole of a town lot in these words: "Eighty-four feet of this lot," does not sufficiently define the quantity of land bid off, and is void.

2. SAME. *Same.* A sale of so many feet front of a town lot and running back of equal width to the depth of the lot would be good; and so, it seems, would be a sale of a definite fractional part of the lot, as for example one-tenth, one-fourth, or one-half, or of so many acres of a tract of land.

FROM DAVIDSON.

Appeal from the Chancery Court at Nashville. A. G. MERRITT, Ch.

T. W. HALEY for complainants.

W. G. BRIEN & SON for defendants.

COOPER, J., delivered the opinion of the court.

Ejectment bill to recover a lot in the city of Nashville. The complainants, Wands and wife, claim title to the lot in right of the wife as the heir of W. H. Townsend, deceased. The defendant holds possession under a sale of the lot as the property of W. H. Townsend for the taxes of 1875. The chancellor held that the tax sale was void because made not only for the unpaid taxes and costs, but for a penalty imposed by the act of 1873, chapter 118, section 61, which in his opinion was repealed by the act of 1875, chapter 102, section 3. Upon the defendant's appeal the Referees find that the penalty

specified was not repealed by the act of 1875, and so this court has held in two cases: *State* v. *Duncan*, 3 Lea, 679, 691; *Nance* v. *Hopkins*, 10 Lea, 508. But the Referees have further reported that the chancellor's decree in favor of the complainants should be affirmed because the land sold, being less than the whole lot, is not sufficiently described in the judgment of condemnation of the circuit court to enable the purchaser to be put in possession by a writ for that purpose. The defendant excepts to the report upon the ground that the lot is sufficiently described. The only question before us, therefore, is whether the land sold is sufficiently described to identify it.

In their bill the complainants describe the lot as: "Lot No. 10 in Campbell's plan of South Nashville lots, fronting on Campbell, now Ash street, 93½ feet, beginning at Richard Deshaser's west corner on said street, running thence 93½ feet to an alley, thence with said alley 30 feet to Elizabeth Bradlaw's line, thence with her line to Deshaser's line, thence with Deshaser's line to the beginning." The title deeds of W. H. Townsend, which are offered in evidence by the complainants, give the same description, except they speak of the lot as "part of lot No. 10." The tax collector, in his report and certificate of sale, made to the circuit court, and embodied in the judgment of that court, describes the lot thus:

District 1,	Name of owner,	Lot	Description,
Ward No. 7.	Townsend, W. H.	No. 10.	Ash sreet, 30 feet front by 30 feet deep.

The taxes, costs and penalty are then properly given under appropriate headings, with a column show-

ing the total sum due to be $5.98. Then follows in a separate column, under the heading "Amount and description," these words: "Tax, penalty and costs bid for 84 feet of this lot." The name of the purchaser, M. M. Brien, and the amount of his bid, $5.98, are added in separate columns under proper headings. The court, after reciting the findings of fact, ordered and decreed "that the title to the property sold as aforesaid be vested in the several purchasers respectively as named in said report," and that writs of possession issue as directed by law. A writ of possession was issued at the expiration of the two years allowed for redemption, under which the defendant was put in possession. The description of the lot as given in the writ is: "Lot No. 10, Ash street, 85 feet front by 30 deep, tax, penalties and costs bid for 84 feet of above lot, city of Nashville, sold as the property of W. H. Townsend, for failure to pay taxes thereon."

The objection, it will be noticed, is not to the description of the lot itself as assessed for taxes. Every requirement of the acts of 1873, chapter 118, section 6, and 1875, chapter 81, section 2, in the description of town lots has been complied with in that description. The description is, however, inaccurate in that it gives the number of front feet at 30 instead of 93½. But the Act of 1873, chapter 118, section 69, expressly provides that no sale shall be invalid because the size and dimensions of a lot have not been "precisely named." The objection is to the description of that part of the lot which was sold,

upon the ground that it is insufficient to enable the court to put the purchaser in possession. The description is: "Tax, penalty and costs bid for 84 feet of this lot." And the question is whether the words "84 feet of this lot," namely of a lot 93½ feet front by 30 feet deep, sufficiently identifies the part sold.

We concur with the Referees in the opinion that the description is insufficient, but not for the same reason. They base their conclusion upon the difficulty of locating the 84 feet. "No one can tell," they say, "at what precise point on Ash street Brien's 84 feet begins or ends." But the act of 1873, chapter 118, section 65, provides that the "least quantity" of the lot which may be taken for the taxes "shall be run off from the beginning corner, and running with at least one line of the tract." The collector's certificate, and the judgment of condemnation show that the sale in this instance was strictly in accordance with the directions of the statute. And the title papers of the delinquent tax-payer show where this beginning corner was. But the real difficulty is that the bid as reported specifies no quantity of the land, unless we construe "84 feet" to mean 84 square feet, or 84 feet square. We may infer that the intention was to bid for 84 feet front, running back of equal width to the full depth of the lot. And such a bid, if expressed and certified, would undoubtedly be good. So a bid of one-tenth, or one-fourth or one-half of a lot or tract of land, or of so many acres would be good, for it could be run off as prescribed by the statute. The

rule in tax sales, as universally settled, is that nothing must be left to inference, and that everything must be determined with reasonable certainty. The rights of the purchaser depend upon a strict compliance with the requirements of the law. The failure in this case is in not defining sufficiently the "quantity" of land bid off.

Exceptions to the report overruled, and the chancellor's decree affirmed with costs.

A TRIBUTE

TO THE MEMORY OF

Hon. ROBERT McFARLAND,

ONE OF THE

SUPREME JUDGES OF TENNESSEE.

KNOXVILLE, OCTOBER 8, 1884.

The Supreme Court Bar of East Tennessee, assembled to pay their tribute of respect to the memory of Judge ROBERT MCFARLAND, and to express their admiration of his character, as man and judge, offer this memorial to preserve the same in enduring record:

Judge McFarland was born at the hamlet of Springvale, Jefferson County (now Hamblen), Tennessee, April 15, 1832. He died, after a long rheumatic illness, at his home in Morristown, of bronchial hemorrhage, at one o'clock, on Thursday morning, October 2, 1884.

As his life, so was his death, calm and peaceful and hopeful. He was of Scotch-Irish descent. His grandfather, Robert McFarland, born in North Carolina, of Scotch-Irish parents, removed thence to Virginia, where he enlisted in the patriot army of the Revolution, and served as lieutenant in the memorable

battle of King's Mountain. In 1783 he emigrated to Tennessee and settled on the waters of the French Broad, where he resided for nearly half a century.

His son, Col. Robert McFarland, father of the judge, served also as lieutenant of riflemen in the American army during the war of 1812, on the northern frontier, and distinguished himself by his gallantry at the battle of Sandy Creek; in later years he was a colonel of the State militia. He died when his son Robert was but twelve years old, leaving to his family no inheritance but his good name.

His widow, the daughter of James Scott, a native of Ireland, was thus left in indigence to rear her family. She was a woman of rare intelligence, dauntless courage and strong maternal ambition, and, in the midst of increasing toil and responsibility, she devoted her life to the welfare and instruction of her children. She had resolved to add to Robert's rich endowment by nature the benefit of an education; and by her own precept and example she exercised a controlling influence in the development of his character. With the aid of her elder son, William (late Congressman from Tennessee), and her son-in-law, Judge Barton, now of Chattanooga, then of Greeneville, she was enabled to send him to school at Tusculum College, near Greeneville, where he lived with his brother-in-law, and received a good English education. Here also he read law with Judge Barton, and was admitted to the bar at Greeneville in 1856.

He had for his first partner Robert Johnson, son of Governor Andrew Johnson. Shortly thereafter he formed a partnership with Col. M. Thornburgh, of New Market, for practice in the Second Circuit, and in that circuit and in Greene County he continued to practice until his elevation to the Supreme Bench, having for his partners after the civil war Robert M. McKee, Esq., at Greeneville, and in the Second Circuit Col. J. M. Thornburgh, son of his former partner.

His preference was for chancery practice, and on the occasion of his first appearance before Chancellor Lucky, he exhibited those traits of character that so distinguished him in after-life, carrying his cause single-handed to successful issue against the combined resistance of the leaders of the bar in the First Circuit, then distinguished by the names of Nelson, Milligan, Deaderick, Maxwell, Arnold and Haynes, with whom he soon took high rank in his profession. His first appearance in the Supreme Court is reported at September term, 1856, in Tally v. Ayers, 3 Sneed, 677; after which his appearance is regular and frequent in the reported cases, giving evidence that in the six years of his *ante bellum* practice he had met with unusual success, for a beginner, in establishing himself at the bar. His course was stopped, however, by the war, which interrupted the administration of law, and he reluctantly laid aside his books and took up the sword.

He deplored the war, its causes, its terrible con-

comitants and its direful necessities. He was a man of peace; he loved social order, and was devoted to the law. But, compelled by the flagrancy of civil war, whose coming he could not avert and whose fury he could not abate, to choose sides in the internecine strife, from a high sense of public duty he volunteered in the Confederate army, and participated in the organization of the Thirty-first Regiment Tennessee Infantry (Col. Wm. M. Bradford), at Knoxville, in March, 1862. He was chosen Major of this regiment, and held this position till the close of the war, serving in the campaign in Kentucky, in 1862, and afterward in East Tennessee and Mississippi, being surrendered at Vicksburg, on the 4th of July, 1863. Exchanged in September, the regiment was reorganized as cavalry, and one-half of it, under Major McFarland, was ordered to Virginia in December, where it bore its part in the memorable campaign of Early in the valley of Virginia, the raid into Maryland, and the skirmishing about Washington, in 1864. He was a cool, brave, gallant officer, not fond of war, yet always at his post, discharging his duty with fidelity and unflinching courage.

Though despairing of the continuance of war after the Hampton Roads Conference, as a fruitless prolongation of a hopeless struggle, he remained with his command, loyally fighting for the failing cause until the conquered banner was furled by Lee, when he endeavored to join his command to Johnson's

army in Carolina. But hearing of his surrender also, the faithful remnant of the wearied veterans turned their faces homeward, and were paroled at Nashville, in May, 1865.

He resumed his practice in the Second Circuit in 1866, and in Greene county in 1867, and engaged in it earnestly and successfully until he went upon the bench. His first reported opinion is in Bayless v. Estes, 1 Heis., 78, when he was serving by special commission in lieu of Judge Nelson in the many cases wherein he was incompetent in the fall of 1870.

In December, 1871, Judge Nelson resigned, and Judge McFarland was commissioned by Gov. Brown to fill the vacancy. In August following he was chosen to serve the unexpired term, and in 1878 was re-elected for the full term. He continued on the bench until December, 1882, when he was forced, by a severe attack of rheumatism, to leave the bench. He cherished, during his long illness, the earnest hope of restoration to health and return to his post, but was never able to resume the bench.

Conscious of the approach of death and without fear of it, he said, with Christian stoicism: "It is as natural to die as to be born." Thus "sustained and soothed by an unfaltering trust," he peacefully passed away "like one who wraps the drapery of his couch about him, and lies down to pleasant dreams."

In 1859 he married Miss Jennie, daughter of H. B. Baker, Esq., of Greeneville. They had three chil-

dren—two daughters and a son—all of whom, with the widow, survive him. Nothing could excel the beauty and happiness of his home life, where existed the confidence, the affection, the reverence and devotion that makes the happy family and the ideal home.

His judicial record of eleven years' continuous service is contained in the Reports from 3 Heiskell to 10 Lea inclusive, and is as free from error as any in the annals of our judicial history.

Considered, as man or judge, the simplicity and purity of his character is a delightful object of contemplation. His sentiments were lofty and noble, his demeanor, modest and unassuming—even to diffidence. He was kind, liberal and generous, slow to promise, scrupulously faithful in performance; grateful for personal favors, and never forgetful of obligation. Though lacking in effusive affection, there was unswerving fidelity in his friendship. Strong in convictions of right, he was singularly free from bigotry and fanaticism. Courteous and polite in his association, he had many friends; but his confidence and intimacy were reserved for a few. He met cordially men of all classes, but commanded respect for his office from all by the quiet dignity of his character and unpretentious purity of his life. He was no politician, and no one ever suspected him of favor or policy in his judicial office. He was religious without display or pretense, charitable without boast or ostentation, tenacious of truth and consecrated to duty.

Free from arrogance, vanity or self-seeking, he devoted his life to the study and exposition of the law, and was ever strong to execute justice and maintain truth. For this he always possessed, in a remarkable degree, the trust of the people and the implicit confidence of the bar.

He was a born lawyer—a judge by nature. He had a logical mind, patient of investigation and trained by reflection rather than much reading. He was singularly free from bias or prejudice, and if as a judge he was not famed for erudition, he fully compensated for its absence by an accurate discrimination, sound judgment and rare practical wisdom. In clearness of vision and perspicuity of statement he was pre-eminent, unrivaled. None ever had occasion to distrust his knowledge of the case, or doubt the meaning of his opinion.

His disposition and habit was, if possible, to solve doubt and determine cases by the application of fundamental principles of law to the facts. In this he resembled the great Chief Justice Marshall; and like Marshall, too, his judicial style was dry and unadorned, void of simile and metaphor and rhetoric. No one will ever seek his opinions for beauty of style or wealth of illustration. But he never failed to be clear and convincing; and though his opinions may not abound in citation of cases to support them, one feels at the conclusion the same serene satisfaction experienced in finishing a geometrical demonstration or a logical syllogism.

His sense of justice was strong, his love of right profound; but above all towered his reverence for law. He could never consent to permit hard cases to make bad law.

In a marked degree, too, he had the judicial temperament, and a singular freedom from the pride of opinion. He weighed and balanced all arguments with an eye single to the law and its requirements. If he had prejudice, he conquered it; if preconception of the law he suspended it, and listened patiently to adverse views; if he had erred, he was open to correction, and readily recalled an erroneous opinion.

No impertinent suggestion, no extraneous consideration ever seemed to divert his mind from the matter to be decided. So entirely judicial was he, so devoted to the solution of the legal problems before him, that nothing ever seemed to interrupt his steady and even progress to a conclusion; this was reached only after a painstaking investigation and impartial consideration of all the material facts in the case before him. His personality, never obtrusive, was lost, or rather absorbed, in legal reflection; so that when he announced his decision, it seemed to the bar not so much the opinion of the court, as the logical, solemn and inevitable judgment of the law.

In correctness of decision, the highest test of a supreme judge, he had no superior. He was not as learned a lawyer as Reese, nor as exact and precise as McKinney, but in clearness of perception,

soundness of judgment and correctness of decision, he rivaled either. The country can boast of a Story, a Kent and a Marshall; East Tennessee has had her Reese, her McKinney and her McFarland.

Our deceased friend has gone before us, but not until, by careful study, profound examination and patient administration of our defective human laws, he had qualified himself to enjoy the comprehension of that higher law, whose seat is the bosom of God and whose voice is the harmony of the world.

Reflecting upon his death, be it

Resolved—1. That the State has lost a loyal citizen, a faithful officer, and an able and impartial judge; society a valuable and useful member, and the bar a sincere and trusted friend.

2. That we tender our sympathy and condolence to the widow and family of our deceased friend.

3. That in token of our respect for him, and our reverence for his memory, we request this testimonial to be spread of record on the minutes of the court and published in the next volume of State Reports.

Respectfully submitted,

H. H. INGERSOLL,
J. B. COOKE,
J. M. THORNBURGH,
JAMES T. SHIELDS,
R. M. MCKEE,
C. J. SAWYERS.

The Bar having adopted the foregoing memorial,

the chairman of the committee, Judge Ingersoll, presented the same to the court on the next day, and moved that the court admit it to record and direct its publication in 13th Lea. Judges Cooper and Freeman, for the court, made eloquent and feeling responses to the tribute of the Bar, expressing their high appreciation of Judge McFarland's character, and their sense of loss from his death; and it was ordered that the memorial be recorded and published as requested.

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An order for the stay of execution on two judgments against T. C. W. & Co., and P and T and W, does not authorize the justice to enter the stay upon a judgment against T. C. W. & Co., although at the time another suit was pending before him against T. C. W. & Co. and P and T and W, judgment on which was not rendered until after date of order to stay. *Shipley, Roane & Co.* v. *Goodwin*, 666.

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